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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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James H. Quello

Sherrie P. Marshall

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INVESTIGATION OF TELECARIBE CORPORATION, Hialeah, Florida, and Ricardo Sablon, Jr.

File No. ENF-91-06

Telecommunications Service to Cuba

ORDER

Adopted: August 30, 1991; Released: September 9, 1991

By the Deputy Chief, Common Carrier Bureau:

1. On February 12, 1991, the Federal Communications Commission (Commission), by its Common Carrier Bureau (Bureau), instituted an investigation into the provision of international telephone service from Florida to Cuba by Telecaribe Corporation (Telecaribe). Such investigation was concerned with apparent violations of the Communications Act and of the Commission's rules arising from the provision of such telephone service between February 4, 1991 and April 12, 1991 without authorization and without filing schedules of tariff charges with this Commission.

2. The Bureau's Enforcement Division has reached an agreement with Telecaribe and its former president, Ricardo Sablon, Jr., that would resolve this proceeding, the terms and conditions of which agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are hereby incorporated by reference.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Consent Decree, incorporated by reference herein, is hereby ADOPTED.

5. IT IS FURTHER ORDERED that the above-referenced proceeding is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INVESTIGATION OF TELECARIBE CORPORATION, Hialeah, Florida, and Ricardo Sablon, Jr.

File No. ENF-91-06

Telecommunications Service to Cuba

CONSENT DECREE

1. On February 12, 1991, the Federal Communications Commission (Commission), by its Common Carrier Bureau (Bureau), instituted an investigation into the provision of international telephone service from Florida to Cuba by Telecaribe Corporation (Telecaribe). Such investigation was concerned with apparent violations of Sections 214(a)[1] and 203(c)[2] of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214(a), 203(c), and of Sections 63.01 and 63.10(a) of the Commission's rules, 47 C.F.R. §§ 63.01, 63.10(a),[3] arising from the provision of

[1] Section 214(a) provides, in pertinent part, as follows:

> [n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line....

[2] Section 203(c) provides, in pertinent part, that no carrier shall engage or participate in foreign communication unless tariffed schedules have been filed and published in accordance with the provisions of the Act and with the regulations made thereunder. Those regulations are contained in Part 61 of the Commission's rules. Section 61.1(c) of the rules provides as follows:

> [n]o carrier required to file tariffs may provide any interstate or foreign communication service until every tariff publication for such communication service is on file with the Commission and in effect.

[3] Section 63.01 requires any person proposing to undertake any operation of any line for which authority is required under the provisions of Section 214 of the Act to request such authority by formal application and show, *inter alia*, how such proposed operation will serve the public interest.

Section 63.10(a) provides, in pertinent part, as follows:

such telephone service between February 4, 1991 and April 12, 1991 without authorization and without filing schedules of tariff charges with this Commission.

2. Telecaribe's telephone service to Cuba also was the subject of action taken by the U.S. Department of Treasury. On March 20, 1991, the Office of Foreign Assets Control of the Department of Treasury issued an *Order to Cease and Desist and Furnish Information* to Telecaribe, stating that Telecaribe's actions could be in violation of the Trading With the Enemy Act [4] and the Cuban Assets Control Regulations.[5] Telecaribe was ordered to immediately cease and desist all direct and indirect telephone service to Cuba.

3. For purposes of this Consent Decree, the following definitions apply:

(a) "Commission" means the Federal Communications Commission;

(b) "Bureau" means the Commission's Common Carrier Bureau;

(c) "Enforcement Division" means the Bureau's Enforcement Division;

(d) "Sablon" means Ricardo Sablon, Jr., aka Richard Sablon;

(e) "Telecaribe" means Telecaribe Corporation or any other similar telecommunications entity, affiliate, subsidiary, successor or company controlled directly or indirectly by Sablon or in which Sablon has or had an interest;

(f) "Order" means the order of the Commission/Bureau adopting the terms and conditions of this Consent Decree and formally disposing of the above-captioned proceeding;

(g) "Effective date of this Consent Decree" is the date that the Order adopting the terms and conditions of this Consent Decree is released.

4. Telecaribe and Sablon admit the jurisdiction of this Commission over it and its current and former principals and over the subject matter of this action for the purposes of this Consent Decree and any Order in recognition of the cost of enforcement actions which ensure compliance with the Communications Act and the Commission's rules.

5. Telecaribe and Sablon agree that, upon their signing and the signing of the Enforcement Division, the provisions of this Consent Decree shall be incorporated by reference in any Order, as described in paragraphs 8 and 11 below, formally adopting this Consent Decree and terminating the proceeding.

6. Telecaribe and Sablon waive any right they may have to appeal any Order, as described in paragraphs 8 and 11 below.

7. In consideration for the termination of this proceeding in accordance with the terms of this Consent Decree, Telecaribe and Sablon agree to the following terms, conditions and procedures that the parties believe will facilitate a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest. Telecaribe and Sablon agree to the following terms, conditions and procedures without admitting or denying any of the alleged violations which led to this proceeding, or admitting any other violations of law, rules or policy.

(a) Telecaribe agrees to make a voluntary contribution to the United States Treasury, without further protest, or recourse to a trial *de novo*, in the amount of $5000.00 within 5 days of the date on which the Order is released.

(b) Telecaribe and Sablon agree that they will secure prior authorization pursuant to Section 214(a) of the Communications Act, file and establish effective schedules of charges in accordance with Section 203(c) of the Act, and comply fully with Commission rules implementing such sections of the Act before engaging in the provision of any common carrier telecommunications service from the United States to any foreign country.

8. In light of the covenants and representations contained in paragraphs 4-7, *supra*, and in express reliance thereon, the Enforcement Division agrees that this document serves to resolve all issues arising from violations of the Communications Act and Commission rules by Telecaribe, if any, in its provision of telephone service to Cuba between February 4, 1991 and April 12, 1991. If this Consent Decree is adopted by Order of the Commission/Bureau, such adoption shall constitute a decision to terminate the File No. ENF-91-06 investigatory proceeding without any finding of violation or liability on the part of Telecaribe, Sablon or any other former or current officer, director, stockholder or employee of Telecaribe.

9. Telecaribe and Sablon agree that any violation of the Order or of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

10. Telecaribe, Sablon and the Enforcement Division further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the File No. ENF-91-06 proceeding, issuance of an Order as described herein, and the compliance of Telecaribe and Sablon with the terms and conditions in paragraphs 4-7, 9 and 11. If the Consent Decree is not signed by all the parties or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and shall not become part of the record in the ENF-91-06 proceeding nor may it be used in any fashion by any party in a legal proceeding.

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[a]ny party that would be a non-dominant international communications service provider must file an application pursuant to § 63.01 for certification to initiate that service to any geographic market....

[4] 50 U.S.C. App. 1 *et seq.*

[5] 31 C.F.R. § 515.201.

11. If the Commission brings an action in United States District Court to enforce the terms of the Order, Telecaribe and Sablon agree that they will not contest the validity of the Order, will waive their statutory right to a trial *de novo* and will consent to a judgment incorporating the terms of this Consent Decree.

For: Telecaribe Corporation

/s/

Richard Sablon

For: Enforcement Division
Common Carrier Bureau
Federal Communications Commission

/s/

Gregory A. Weiss
Deputy Chief (Operations)
8/29/91

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Centel Telephone Companies — Transmittal No. 178
Revisions to Tariff F.C.C. No. 1

Vista Telephone Companies — Transmittal No. 1
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: August 27, 1991; Released: August 30, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. The captioned tariff revisions, which were filed to reflect the sale of the properties of the Centel Telephone Companies (Centel) in Iowa and Minnesota to Rochester Telephone Corporation,[1] are scheduled to become effective September 1, 1991 on 90 days' notice. American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) have filed petitions against the Vista tariff and MCI has also filed a petition against Centel's tariff. Vista and Centel have filed replies.

2. AT&T argues that its petition against Centel's annual access tariff filing showed that Centel had substantially exceeded the assignment of Subscriber Line Charge billing costs to the Common Line rate element. AT&T contends that Vista's tariff should be suspended and investigated because Vista's tariff relies on Centel's projected assignments of Other Billing and Collection (OB&C) expense. Thus, AT&T concludes, Vista's tariff suffers from this same deficiency. AT&T Petition at 1-2.

3. MCI complains that the Vista rates for the two study areas that are significantly higher than the rates that Centel filed in its annual access tariff on April 2, 1991. MCI maintains that the lion's share of this increase is due to Vista's obligation immediately to pay approximately $1.4 million in deferred taxes previously booked by Centel. MCI argues that Vista should not be permitted to recover this increased tax expense from ratepayers. MCI Vista Petition at 2-3. MCI also argues that Centel has failed to reduce its general corporate expenses, despite the fact that it will have two fewer companies to administer. MCI Centel Petition at 2-3. Further, MCI contends that Centel has increased its accounting and data processing expenses despite Centel's claim that the sale of its Iowa and Minnesota operations will reduce these expenses. *Id.* at 3-4.

4. In response, Vista describes its increased tax expense as an unavoidable consequence of the sale and concludes that it is entitled to recover these costs. Vista Reply at 4-5. Vista also argues that its forecast of OB&C expenses reflects the fact that it will be obtaining these services from Centel under contract and therefore is correct. Vista further asserts that Centel has fully justified its allocation of OB&C expense to the Common Line rate element. *Id.* at 6-7.

5. Centel argues that the general corporate expenses MCI challenges are company-wide and are not directly dependent on individual operating companies. Thus, it says, the sale will not result in any reduction in these expenses. Centel Reply at 2-4. Finally, Centel states that its accounting and data processing expenses are increasing despite the transaction with Rochester but adds that they would increase more if it had not completed this transaction. *Id.* at 4-6.

6. The Common Carrier Bureau has reviewed the captioned tariff revisions, the petitions, and the replies of Centel and Vista. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

7. Therefore, IT IS ORDERED that the petitions to reject or in the alternative to suspend and investigate Vista Telephone Company Tariff F.C.C. No. 1, Transmittal No. 1, filed by American Telephone and Telegraph Company and MCI Telecommunications Corporation, and the petition to reject or in the alternative to suspend and investigate Centel Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 178 filed by MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] Rochester has renamed the companies Vista Telephone Company of Iowa and Vista Telephone Company of Minnesota (collectively "Vista").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3216

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: August 30, 1991; Released: September 3, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3216 to modify Virtual Telecommunications Network Service (VTNS) Option 66, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Specifically, the modifications to Option 66: add the capability to place calls between specified international locations and the United States; modify the switched access charges, the Type II authorization codes, and the calling matrix to reflect the new international calling capability; introduce an international data transmission capability (DTC), voice transmission capability, and satellite transmission capability volume pricing plan; reduce the basic charge from $53,900 per month to $51,274 per month and modify the service elements included in the basic charge; modify the change charges provisions; modify the outage credit units; and make certain textual changes. *See* AT&T Transmittal No. 3216 Description and Justification (D&J) at 2-7. The transmittal is scheduled to take effect on September 4, 1991.

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate the Option 66 modifications or to provide alternative relief, on July 8, 1991. [1] AT&T filed a reply on July 15, 1991.

3. Williams contends that modified Option 66 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[2] and must be reviewed in light of the remand. Williams Petition at 2. Williams alleges that Option 66 features bundling of 800 service with other Tariff 12 services which allows AT&T to take advantage of the lack of number portability and effectively preclude a customer from leaving AT&T. *Id.* at 2-7.

4. Williams claims that this filing is unlawful because it violates the anti-discrimination provisions of the Communications Act. *Id.* at 7-14. Specifically, Williams argues that AT&T has failed to demonstrate that modified Option 66 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *Id.* at 8-12. Williams also contends that even if Option 66 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 12-14 (also insisting that because the integrated service packages are "like" the Commission should examine the underlying contracts).

5. Williams further alleges that modified Option 66 violates the Commission's policy against geographic rate deaveraging, that it is not generally available, and that Tariff 12 packages violate the Commission's *Private Line Guidelines*. *Id.* at 14-17. Williams urges the Commission to reject or suspend Transmittal 3216, or at a minimum, requests that this transmittal take effect subject to the remand proceedings. *Id.* at 17-18.

6. AT&T replies that Williams makes no claims directed to the tariff revisions at issue here, but instead repeats the same arguments that it has advanced in opposition to virtually every Tariff 12 filing. AT&T Reply at 1. In response to Williams' new claim of improper bundling of 800 service access with other switched private line access AT&T responds that this assertion is meritless since it based on the patently false premise that VTNS is simply a combination of services. *Id.* at 1-2.

7. In response to Williams' charges of discrimination, bundling, "likeness" among options, lack of general availability, and geographic rate deaveraging, AT&T maintains that these allegations have been raised without success in previous VTNS filings and insists that Williams' claims provide no basis for any different treatment of the revisions to Option 66. *Id.* at 34. AT&T also insists that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings and notes that the Commission has issued several orders allowing VTNS Options to become effective since the release of the Court of Appeals *Tariff 12 Remand*. *Id.* at 4. Therefore, AT&T asserts that the most that the Commission should do is make Option 66 subject to the outcome of the remand proceeding. *Id.* at 5.

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3216, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

9. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990). Although Transmittal 3216 does not present new

[1] We do not address in this Order a petition submitted by MCI Telecommunications Corporation (MCI) 49 days after the filing deadline. MCI incorrectly cites Section 1.45 of the Commission's Rules as its authority for the late filing. Section 1.773 of the Commission's Rules controls here, and pursuant to Section 1.773(a)(2)(ii), petitions to reject this transmittal should have been filed no later than July 8, 1991.

[2] *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g and remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 3216 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

10. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3216 filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief,
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAN MARCOS LANG DISTANCE, INC.
d/b/a SM Long Distance — File No. I-T-C-91-169

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 30, 1991; Released: September 9, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice and data services to the general public by San Marcos Long Distance, Inc. (San Marcos).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-169 IS GRANTED, and San Marcos is authorized to provide international switched voice and data services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariff F.C.C. No. 1 and Vyvx's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant is limited, under this order to the provision of international switched voice and data services only. Nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] San Marcos Long Distance, Inc. is a wholly-owned subsidiary of SM Telecorp, Inc., of which the majority interest is owned by the same persons who own the majority interest in San Marcos Telephone Company. In addition, some offices and directorships of the three subject corporations are held by the same persons.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CARIBBEAN AMERICAS TELECOMMUNICATIONS CORP. File No. I-T-C-91-172

Application for authority to operate as an international resale carrier.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 30, 1991; Released: September 9, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Caribbean Americas Telecommunications Corp. (CATC).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-172 IS GRANTED and CATC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTELLICALL VENDING, INC. File No. I-T-C-91-164

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 30, 1991; Released: September 9, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Intellicall Vending, Inc. (Intellicall Vending).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-164 IS GRANTED, and Intellicall Vending is authorized to provide international switched voice service by the resale of the international switched voice service set forth in Intellicall Operator Service's Tariff F.C.C. No. 1, AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-8

In re Applications of

EVE ACKERMAN	File No. BPH-871123MA
WAYNE G. FIELDS AND GERALDINE Y. MILLER d/b/a L.L. BROADCASTING	File No. BPH-871124ME
ALACHUA BROADCASTERS, INC.	File No. BPH-871124MN
BRENT L. HARMON AND ELVIN L. HARMON d/b/a HARMON BROADCAST PARTNERS	File No. BPH-871124MQ

For Construction Permit for a
New FM Station on Channel 223A
in Alachua, Florida

Appearances

Dennis J. Kelly on behalf of Eve Ackerman, *Lawrence M. Miller* on behalf of Wayne G. Fields and Geraldine Y. Miller d/b/a L.L. Broadcasting, *Donald E. Martin* on behalf of Alachua Broadcasters, Inc., *James A. Koerner* on behalf of Brent L. Harmon and Elvin L. Harmon d/b/a Harmon Broadcast Partners, *Daniel F. Van Horn* on behalf of Lynn T. Rivers and James S. Rivers III, and *Larry A. Miller* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: August 30, 1991; Released: September 9, 1991

1. This proceeding involves the mutually exclusive applications of Eve Ackerman (Ackerman), Wayne G. Fields and Geraldine Y. Miller d/b/a L.L. Broadcasting (L.L.), Alachua Broadcasters, Inc. (ABI), and Brent L. Harmon and Elvin L. Harmon d/b/a Harmon Broadcast Partners (the Harmons) for a construction permit for a new FM station to operate on channel 223A in Alachua, Florida. The Commission designated these competing applications for hearing pursuant to a *Hearing Designation Order* released in this proceeding on February 12, 1990 (DA 90-15), along with other competing applications which have since been dismissed.[1]

2. The *Hearing Designation Order* specified the following issues:

(1) To determine with respect to Alachua whether the applicant is financially qualified.

(2) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. A prehearing conference was held on April 18, 1990, and hearing sessions were held on July 24 and 25, 1990, at which time the record was closed. Proposed Findings of Fact and Conclusions of Law were filed by all four applicants, and each applicant subsequently filed a Reply.

Financial Qualification Issue Designated Against ABI

4. All parties are in agreement that the source of funding for ABI, Avondale Properties, Inc. (Avondale), is not a financial institution. Mr. Picus testified that on May 29, 1990, he reviewed the financial records of Avondale, and concluded, to his satisfaction, that Avondale had sufficient net liquid assets to meet its commitment to provide ABI with the necessary funds to build and operate its station (ABI, Ex. #3, p. 2). On the basis of his review of Avondale's finances and Avondale's commitment to provide the necessary funds, ABI amended its application, post-designation, to reflect that it was now financially qualified to build and operate the proposed station. The amendment reflecting ABI's financial certification was accepted by *Order* (90M-2262), released in this proceeding on July 27, 1990.

5. Although ABI concedes that a balance sheet or other documentary evidence of Avondale's financial resources, which it failed to provide, would be clear evidence of sufficient net liquid assets, it submits that the Commission is prepared to accept a lesser showing. ABI contends that Mr. Picus' review of Avondale's resources is adequate to satisfy its burden of proof with respect to the financial qualifications issue designated against its application.

6. As to the specific term of the financing arrangement with Avondale providing for the extension to Avondale of up to seventy-five percent of ABI's equity, ABI points to a number of ways in which it can meet that commitment. Firstly, ABI could simply amend its charter to authorize the issuance of more non-voting stock, retire some of Mr. Picus voting stock to a point where his outstanding voting stock in ABI is equal to 25 percent of the equity of the corporation or, if necessary, Donald T. Moses, the non-voting shareholder's equity interest in ABI could be reduced to zero to meet ABI's equity commitment to Avondale.

7. ABI has the burden of proof with respect to the financial qualifications issue designated against its application (*Gaco Communications Corp.*, 94 F.C.C. 2d 761) (R.B. 1983). To meet this burden, it must demonstrate, clearly and convincingly, that it has complete, adequately explained and realistic estimates of both the construction and initial operating costs as well as a reasonable assurance of the necessary funds to meet these proposed expenses (*Christian Childrens Network, Inc.*, 1 F.C.C. Rd. 982) (R.B. 1986).

8. As noted above, Avondale is not a financial institution. It was necessary, therefore, for ABI to demonstrate by clear and convincing evidence that Avondale, which is in the business of buying and selling real estate (Tr. 189),

possesses sufficient net liquid assets to meet its commitment to ABI. There is, however, no documentary evidence in the record demonstrating Avondale's ability to provide ABI with the necessary funds. Mr. Picus' review of Avondale's financial records and his self-serving statement that this review convinced him of Avondale's ability to meet its financial commitment (ABI, Ex. #3, p. 2) is clearly self-serving and insufficient to meet ABI's burden of proof under the financial qualifications issue. An Applicant is required to produce probative evidence at the hearing. Such evidence must consist of more than a self-serving, uncorroborated statement of the individual responsible for making the financial certification that he has taken the necessary steps to assure himself of the availability of the necessary funds. In the absence of documentary evidence illustrating Avondale's ability to meet its commitment, it is impossible for the trier of fact to conclude that Avondale, which is normally in the real estate business, has sufficient uncommitted resources to fund ABI's proposal. Accordingly, the Presiding Judge concludes that ABI has failed to meet its burden of proof with respect to the financial qualifications issue designated against its application by the *Hearing Designation Order* released in this proceeding on February 12, 1990, and ABI is found to be financially unqualified and its application will be denied.

9. Although a conclusion need not be reached as to the sufficiency of ABI's cost projections for the construction and operation of the station for three months without revenues, in light of ABI's failure to meet its burden of proof as to the availability of the necessary funds, the Presiding Judge notes that serious questions have also been raised by opposing parties as to the validity of ABI's estimate of the costs involved in building and operating its proposed station. It is noted, for example, that ABI's budget did not include the $6,000.00 filing fee, or the costs of prosecuting its application (ABI, Ex. #3, p. 4). In addition, there is no provision in the operating expenses for programming services, news services, and interest payments that would be due to its lender (ABI, Ex. #3, p. 5; Tr. 189), or costs associated with the closing of the loan (Tr. 189). Mr. Picus candidly admitted that he has no idea what those expenses might be (Tr. 189) and that he has not budgeted for them (Tr. 190). ABI's failure to account for these expenses, makes it impossible to conclude that the $300,000 projected loan from Avondale is sufficient to meet ABI's total costs of construction and three months of operation.

10. Serious questions have also been raised as to whether or not ABI will be able to meet the terms in the "commitment" letter from Avondale. Although ABI is confident that up to 75 percent of the equity in ABI could be transferred to Avondale in the form of non-voting stock, it is noted that Mr. Moses, ABI's non-voting shareholder, who presently holds 50 percent of ABI's equity, would have to relinquish his equity interest in ABI, and that this equity interest along with half of Mr. Picus' equity, would be required to meet Avondale's projected 75 percent equity interest in ABI. The record contains, however, only Mr. Picus' statement that ABI has reached an oral agreement with Mr. Moses whereby Mr. Moses agrees to relinquish his stock and equity interest in ABI to Avondale, and that Mr. Picus, in turn, will take care of him (Tr. 170-171). The record is otherwise devoid of any evidence indicating that there is a firm commitment on Mr. Moses' part to relinquish his equity share in ABI in order to meet ABI's commitment to Avondale. Accordingly, the Presiding Judge concludes that there is no assurance in the record, assuming that Avondale has the necessary funds, that ABI will be able to provide Avondale with the agreed to equity share in ABI; and that ABI will, therefore, be in a position to meet the terms of Avondale's commitment letter.

11. ABI has been found to be financially unqualified and its application will be dismissed. In the event, however, that ABI's disqualification is set aside on appeal and its application reinstated, ABI's application will be considered, along with the remaining applications, under the standard comparative issue.

EVE ACKERMAN

Findings of Fact

12. Eve Ackerman is an individual applicant. In the event that her application is granted, she will operate the proposed FM broadcast station as a sole proprietorship (Ackerman, Ex. #1, p. 1).

Diversification of Media Interests

13. Ms. Ackerman has no ownership interest in any other medium of mass communications. Although she is a member of the Board of Directors of "Friends of Classic 89", a fundraising organization affiliated with non-commercial educational FM broadcast station WUFT-FM, Gainesville, Florida licensed to the University of Florida, Ms. Ackerman is not an officer or a member of the Board of Trustees of the University of Florida (Ackerman, Ex. #1, p. 1).

Best Practicable Service

14. In the event that her application is granted, Ms. Ackerman will serve as the full-time General Manager of her proposed station, devoting at least 40 hours a week on a day-to-day basis to the management of the station. As General Manager, Ms. Ackerman would oversee all operations of the station as well as its employees, and she will have ultimate authority over all aspects of the station's operations. Ms. Ackerman will also make all financial and hiring and firing decisions for the station (Ackerman, Ex. #1, p. 1-2).

15. Ms. Ackerman moved to Gainesville, Florida in 1973, and she has been a resident of that community continuously since that time. All of her residences in Gainesville have been within the 1 mV/m contour of her proposed station, and she intends to continue to reside in her current home in the event that her application is granted (Ackerman, Ex. #1, p. 2-3).

16. In 1989 and 1990, Ms. Ackerman was co-organizer and panelist at conferences addressing "Drugs and the Family" and "Drugs and Youth --The Role of the Religious Community" in Gainesville, Florida, and in 1990, she served as a moderator for the substance abuse session at the "Violence and Women Conference" in Gainesville, Florida. Since 1990, Ms. Ackerman has been an advisor to the Hippodrome Improvisational Teen Theater, and from 1985 to the present, she has been Chair of the Alachua County Project Graduation promotions committee. She is also a member of the following on going activities in Gainesville: the Gainesville Area Women's Network and the Alachua County/Gainesville League of Women Voters

since 1980; the Gainesville Speculative Literature Society since 1979 (founder and past President); the Gainesville Commission on the Status of Women Sexual Battery Committee since 1989; the Alachua County Democratic Executive Committee since 1984, and she served as the chair of its Education Committee from 1988 to July 1990. In addition, since 1990 Ms. Ackerman has served as the Chair of the Gainesville Committee to resettle Soviet Jews and as a member of the Board of Directors of Friends of Classic 89 (Ackerman, Ex. #1, pp. 4-5).

17. In 1984, Ms. Ackerman was chair of the Alachua County Project Graduation, and between 1985 and 1989 she served as advisor to the Gainesville High School Resource and Information Network and to the Gainesville's Buchholz High School Counseling and Teen Support. Ms. Ackerman also served as advisor to the Teen Advisory Board in Gainesville in 1988 and 1989, and during the same years, she co-wrote training materials in a program entitled, "Drug-Free Children - The Key to Our Future" used by the Florida PTA in Gainesville as well as state-wide (Ackerman, Ex. #1, pp. 3-4).

18. From 1980 to 1988, Ms. Ackerman was a co-founder and member of the Gainesville Press Club, serving one-year terms as President and Vice- President, and in 1977-78, she was a member of Sigma Delta Chi Society of Professional Journalists, serving as Vice-President of the North Florida chapter which included journalists from the Gainesville market. In 1979, Ms. Ackerman served as a volunteer counselor with the Sexual and Physical Abuse Resource Center in Gainesville, and from 1979 to 1983, she served as an adult advisor to the B'nai B'rith Youth Organization in Gainesville, Florida (Ackerman, Ex. #1, p. 4).

19. Ms. Ackerman was employed as a news reporter and news director from 1976 to 1980 at station WGGG(AM), Gainesville, Florida, and from 1982 to 1983, as a reporter/assignment editor/producer at television station WCJB (TV), Channel 20, Gainesville, Florida (Ackerman, Ex. #1, p. 5).

Auxiliary Power

20. Ms. Ackerman will utilize auxiliary power at both transmitter and studio locations (Ackerman, Ex. #1, p. 5).

Conclusions of Law

Diversification

21. Ms. Ackerman's application is not subject to any demerit under this criterion.

Best Practicable Service

22. Ms. Ackerman proposes to be integrated into the management of her proposed station on a full-time basis. There is no evidence of record which disputes this claim, or raises questions as to her ability to meet this commitment. Ms. Ackerman is a long-term resident of the service area, with a moderate degree of civic involvement. Her integration proposal is, therefore, entitled to a 100 percent quantitative integration credit, with qualitative enhancements for her long-term service area residence with civic involvement, her gender, and, to a slight degree, by her past broadcast experience.

23. Ms. Ackerman's application is entitled to further enhancement for her proposal to install an auxiliary power source at her studio and antenna site.

WAYNE G. FIELDS AND GERALDINE Y. MILLER D/B/A L. L. BROADCASTING

Findings of Fact

24. L.L. is a general partnership consisting of two general partners. Wayne G. Fields, who holds a 75 percent interest in the partnership and his mother, Geraldine Y. Miller, who holds the remaining 25 percent interest in the partnership (L.L., Ex. #1, p. 1; L.L., Ex. #2, p. 1).

Diversification

25. Neither L.L. nor its two general partners has any interests in any medium of mass communications (L.L., Ex. #1, p. 8; L.L., Ex. #2, p. 8).

Best Practicable Service

Wayne G. Fields

26. If L.L.'s application is granted, Mr. Fields proposes to be integrated into the management of the station as the full-time General Manager, devoting no less than 40 hours a week to his duties at the station. As General Manager, he will be responsible for supervising all aspects of the station's operations, and he will have ultimate authority and responsibility for all decisions respecting the hiring and firing of station personnel and for establishing the station's policies, including those concerning programming, sales and E.E.O. matters (L.L., Ex. #1, p. 1, Tr. 137-138).

27. Mr. Fields, a Black male, is a long-term resident of the Alachua area, having resided in Gainesville for nearly 35 years. His past and present Gainesville residences are all located within the service contour of the proposed station. If L.L.'s application is granted, Mr. Fields will move to the community of Alachua, Florida (L.L., Ex. #1, pp. 1-2). Since 1987, Mr. Fields has been involved in numerous activities in the Gainesville area.[2]

28. Mr. Fields has had extensive broadcast experience serving in a wide variety of capacities, including announcer, producer and host, news director, engineer-operator, station manager, and program director at radio and television facilities (L.L., Ex. #1, pp. 6-7).

Geraldine Miller

29. Ms. Miller, a Black female, proposes to serve as Director of News and Public Affairs at the station, devoting no less than 40 hours a week to her duties at the station. As Director of News and Public Affairs, she lists her responsibilities as including implementing the station's editorial and public affairs policies, coordinating the ascertainment of community service area problems and needs, supervising the presentation of non-entertainment programming, and setting policy with respect to the station's journalistic standards and practices (L.L., Ex. #2, p. 1). She will also be responsible for public service announcements and political programming, and she will oversee station interns as well as paid announcers assigned to assist with the programming for which she is responsible (Tr. 86).

30. Ms. Miller is a long-term resident of Gainesville, Florida. Since 1962, she has lived at a residence in Gainesville, Florida which is located within the service contour of L.L.'s proposed station (L.L., Ex. #1, pp. 1-2). Ms. Miller has been involved, since 1977, with numerous civic activities in the Gainesville, Florida area. [3]

31. Ms. Miller has never worked at a broadcast station (Tr. 76).

Auxiliary Power

32. L.L. will install auxiliary power facilities at the Alachua station to permit continued broadcast service in the event of a power failure in the area (L.L., Ex. #1, p. 8).

Conclusion of Law

Diversification

33. L.L.'s application is not subject to a diversification demerit.

Best Practicable Service

Wayne G. Fields

34. Mr. Fields, a Black man, proposes to be integrated into the management of L.L.'s proposed station as the full-time General Manager, devoting no less than 40 hours a week to his duties at the station. There is no evidence of record which calls into question the sincerity of this commitment or of Mr. Fields' ability to meet this commitment.

35. Mr. Fields is a long-term resident of the service area. If L.L.'s application is granted, Mr. Fields has pledged to move to the community of Alachua, Florida. The evidence of record demonstrates that Mr. Fields has been involved in numerous civic activities within the proposed service area, and has extensive past broadcast experience. Accordingly, the quantitative integration credit awarded L.L. for Mr. Fields' proposed integration into the management of the station is qualitatively enhanced by his African-American heritage, his long-term residence within the service contour of his proposed station with a significant degree of involvement in the civic affairs of the community, his commitment to move to the community of Alachua, Florida in the event that L.L. is the successful applicant, and, finally, to a slight degree by his past broadcast experience.

Geraldine Miller

36. Mrs. Miller has been retired since 1981, and has not held a paid position since that time (Tr. 76). The record demonstrates that Mrs. Miller has had virtually no involvement in the application process apart from contributing to the joint expenses of prosecuting L.L.'s application. For example, she had no contact with L.L.'s engineer before the application was filed. In addition, she supplied none of the information contained in the application (Tr. 93, 131), and she was not involved in locating the transmitter site (Tr. 85). Ms. Fields freely admitted that she left the preparation of L.L.'s application to her son, Wayne Fields (Tr. 93, 131) and that he was taking whatever steps were necessary to assure that L.L. was financially qualified (Tr. 84). Mrs. Miller further testified that she intends to defer to the judgement of her son in the future (Tr. 91). These candid admissions, when viewed in the light of her lack of gainful employment since 1981, makes it highly unlikely that Mrs. Miller will assume a full-time management position at the station. The Presiding Judge finds, therefore, that Mrs. Miller's integration pledge is not credible, and L.L. will not receive an integration credit for Mrs. Miller.

37. However, if L.L. is found, on review, to be entitled to a quantitative integration credit for Mrs. Miller's proposal to be integrated into the management of L.L.'s station, such credit would be qualitatively enhanced by her African-American heritage, her long-term residence within the service contour of the proposed station with a significant degree of involvement in the civic affairs within that area, and her gender.

38. The Presiding Judge concludes, therefore, that L.L. is entitled to a 75 percent quantitative integration credit which represents Mr. Fields' total equity interest in the applicant, qualitatively enhanced in the manner indicated above.

39. L.L.'s application is entitled to a further credit for its proposal to install an auxiliary power source at its Alachua, Florida station to permit continued broadcast service in the event of a power failure.

ALACHUA BROADCASTERS, INC.

Findings of Fact

40. ABI is a Florida corporation. Arthur Picus is the President, Vice-President, Secretary, Treasurer and sole Director. Mr. Picus owns 50 shares of common voting stock and Donald T. Moses owns 50 shares common non-voting stock. Mr. Picus owns 50 percent of the equity in ABI, and Mr. Moses the remaining 50 percent (ABI, Ex. #1, p. 1).

41. ABI has entered into an agreement with Avondale Properties, Inc. whereby Avondale may acquire non-voting stock in ABI up to an amount not to exceed 75 percent of the equity of the company. Avondale will acquire the stock gradually as it lends funds to ABI. Equity will first be transferred from the account of the present holder of the non-voting stock, Mr. Moses. If and when that account is depleted, additional acquisitions of non-voting stock by Avondale will result in the reduction of equity held by Mr. Picus. Thus, the agreement between ABI and Avondale, if fully effectuated, contemplates the following ownership of stock:

Arthur Picus - 100 percent voting stock
25 percent equity

Avondale - 100 percent non-voting stock
75 percent equity

(ABI, Ex. #1, p. 1, see also *Order*, 90M-2262, released 7/27/90).

Diversification

42. Neither ABI, nor any principal of ABI holds any ownership interest in any medium of mass communications (ABI, Ex. #2, p. 2).

Best Practicable Service

43. Arthur Picus will serve as General Manager of the proposed station on a full-time basis, serving a minimum of 40 hours a week. In that role, Mr. Picus' duties will include hiring and supervising all station employees. He will also be responsible for the development and establishment of all station policies, and he will oversee the implementation of those policies (ABI, Ex. #2, p. 1).

44. Mr. Picus will move to Alachua, Florida and establish his residence there in the event ABI's application is granted (ABI, Ex. #2, p. 1).

45. Mr. Picus is a former Sales Manager for station WZAZ(AM), Jacksonville, Florida and WZAZ-FM, Green Cove Springs, Florida (ABI, Ex. #2, p. 1, Tr. 168, *Order* 91M-2672, released 8/29/91). From October 1984 until February 1987, Mr. Picus was employed as a salesman for WZAZ(AM) (ABI, Ex. #2, p. 2), and from August 1981 until March 1983, Mr. Picus was an announcer and salesman for station WEHA(AM) (now WENR) Athens, Tennessee (ABI, Ex. #2, p. 2). Mr. Picus is presently an account executive for radio station WZGC(FM), Atlanta, Georgia (*Order* 91M-2672, released 8/29/91).

Auxiliary Power

46. ABI does not propose to install an auxiliary power source.

Conclusions of Law

Diversification

47. ABI is not subject to a diversification demerit of any degree.

Best Practicable Service

48. Mr. Picus is the sole voting shareholder. He proposes to be integrated on a full-time basis as General Manager of ABI's proposed station. ABI would, therefore, be entitled to a 100 percent quantitative integration credit, qualitatively enhanced by his decision to move to Alachua, Florida in the event that ABI is the successful applicant, and by his past broadcast experience.

49. ABI does not propose to install an auxiliary power system at its station and transmitter site. It's application, therefore, is not entitled to further enhancement for an auxiliary power proposal.

BRENT L. HARMON AND ELVIN L. HARMON D/B/A HARMON BROADCAST PARTNERS

Findings of Fact

50. The Harmons is a general partnership whose general partners are Brent L. Harmon and Elvin J. Harmon (Harmons, Ex. #1, p. 1). Although the equity of the partnership is split 75 percent for Elvin Harmon and 25 percent for Brent Harmon, the Harmons contend that voting control is equal (Tr. 225, 227, 233-234).

Diversification

51. Neither the Harmons nor any one of its general partners has any cognizable media interests. It is noted that Elvin L. Harmon, the sole owner of radio station WFNS, Plant City, Florida made a timely pledge to divest himself of any interest held in the Plant City, Florida broadcast facility in the event that the Harmons is the successful applicant (Harmon, Ex. #1, p. 1).

Best Practicable Service

Elvin L. Harmon

52. Elvin Harmon intends to serve as Station Manager on a full-time basis, devoting 40 hours or more to such duties as overseeing sales, station expenditures, dealing with banks and other financial institutions, interfacing with local and F.C.C. counsel, meeting with community leaders, and, together with the General Manager, formulating the station's programming (Harmons, Ex. #3, p. 2). In the event of a grant of the Harmons' application, Elvin Harmon will move to Alachua, Florida (Harmons, Ex. #3, p. 2).

Brent L. Harmon

53. Brent Harmon will serve as the full-time General Manager of the Harmons' proposed station, with responsibility for overseeing all facets of the station's operations (Harmons, Ex. #2, p. 2). In the event that the Harmons' application is granted, Brent Harmon will move to Alachua, Florida (Harmons, Ex. #2, p. 2).

54. Brent Harmon is presently, and has been since 1987, General Manager of station WPLA, Plant City, Florida (Harmons, Ex. #2, p. 1).

Auxiliary Power

55. Harmons intends to install an auxiliary power generator at both the studio and transmitter locations (Harmons, Ex. #4).

Conclusions of Law

Diversification

56. As noted above, there has been a timely commitment to divest the Plant City, Florida broadcast facility. Accordingly the Harmons' application is not subject to a diversification demerit.

Best Practicable Service

57. Brent Harmon will work full-time, a minimum of 40 hours a week, as General Manager at the Harmons' proposed station. There is no evidence of record which calls into question the sincerity of that commitment or his ability to fulfill that commitment. Any quantitative integration awarded to the Harmons' application for Brent Harmon's integration proposal is qualitatively enhanced by his decision to move to Alachua, Florida in the event that the Harmons is the successful applicant and by his past broadcast experience.

58. The Harmons claim a full-time quantitative integration credit for Elvin L. Harmon's decision to serve as Station Manager on a full-time basis. The evidence of record, however, calls into question this claim. Mr. Harmon currently works at station WPLA (AM) on a semi-retired basis, and freely admitted that he does not go into the station every day (Tr. 205). On cross-examination, Mr. Harmon testified that he would supervise no one in particular at the Alachua, Florida station, and that he would leave the day-to-day operations of the station to his son, as

he is doing at station WPLA (Tr. 210). He also did not know whether or not he would be doing any selling of advertising time, and indicated that the Sales Manager would not be working under him (Tr. 210). He believes that he will be working forty hours a week and that his commitment would probably be for eight hours a day (Tr. 211); and that he believes that he would sit in on staff meetings (Tr. 209, 210). On the basis of his testimony, including the degree of uncertainty with which he described his role at he station, it is impossible to conclude that Elvin L. Harmon's role at the station will be either meaningful or substantial. No credit will, therefore, be awarded the Harmons for their proposed integration of Elvin L. Harmon into the management of the station. In addition, Elvin L. Harmon's commitment to move to Alachua is also suspect. By his own admission, as of the date of his testimony, he had never been to Alachua. It seems highly unlikely that someone contemplating a move to new community would fail to visit that community before committing himself to leave Clearwater, Florida, his city of residence for 32 years (Tr. 208).

59. Elvin L. Harmon and Brent Harmon testified that they each have an equal vote in the partnership's affairs under the terms of their partnership agreement (Tr. 227, 234). The agreement, as amended, however, provides that capital contributions are to be made on a percentage basis with Elvin Harmon contributing 75 percent and Brent Harmon 25 percent (L.L., Ex. #3, p. 1, section 3.1), with the profits and losses of Harmons distributed in the same proportion (L.L., Ex. #3, p. 5, section 4.1); and that votes in the partnership are assigned according to the distributive share of each partner (L.L., Ex. #3, p. 2; Tr. 236-37). According to the terms of the Harmons General Partnership Agreement, Brent Harmon's distributive share would be only 25 percent (Tr. 235-36). It appears, therefore, that despite Elvin and Brent's claim that each will have an equal vote in the partnership (Tr. 227, 234), Brent Harmon will have only a 25 percent voting interest in the Harmons. Accordingly, the Presiding Judge finds that the Harmons are entitled to only a 25 percent quantitative integration credit for its proposal to integrate Brent Harmon into the affairs of its proposed station, and that this credit is qualitatively enhanced by Brent Harmon's decision to move to Alachua, Florida in the event that the Harmons' application is granted and by his past broadcast experience.

60. The Harmons' application is entitled to a further comparative credit for its decision to install auxiliary power generators at both the studio and transmitter locations.

COMPARATIVE COVERAGE

61. The Commission in its *Hearing Designation Order* released in this proceeding required that evidence be presented as to the areas and populations to be served by each proposal as well as broadcast services already serving the area. All four applicants agree that there are five or more aural services day or night within the differential area of proposed coverage contours (Joint Exhibit #1, p. 1), and all four have agreed that the following figures constitute the proposed coverage for each applicant.

Applicant	Population	Area (sq. km.)
Ackerman	130,667	1,855
Harmons	131,467	1,839
L.L.	135,605	1,850
Alachua	128,748	1,841

(Joint Exhibit #1, Table IV).

62. Of the four applicants, only L.L. believes that there is a decisionally-significant difference between the coverage proposals of the four applicants, and it claims a very slight preference for its greater population coverage on the basis that it will serve 4,938 more people than Ackerman, 6,857 more people than ABI, and 4,138 more people than the Harmons.

63. The Presiding Judge concludes that the differences in overall coverage of the well served areas and populations are too small to be decisionally significant, and that awarding a comparative advantage to anyone of the four applicants under the comparative coverage criterion is not unwarranted (*Susan S. Mulkey*, 4 F.C.C. Rcd. 5520) (1989).

ULTIMATE CONCLUSIONS

64. Eve Ackerman is the clear comparative winner. She, among the qualified applicants has been found to propose 100 percent quantitative integration credit. Her nearest competitor is L.L. which has been found to be entitled to only a 75 percent quantitative integration credit. Furthermore, Ms. Ackerman's integration credit is qualitatively enhanced by long term residence in the city of license with a moderate degree of civic involvement, by her gender and to a slight degree by her past broadcast experience. L.L.'s quantitative integration credit with its enhancements cannot overcome the clear comparative advantage which Ms. Ackerman's application possesses.

65. Ms. Ackerman and L.L. are on an equal footing with respect to all other comparative criteria.

RULINGS

IT IS ORDERED that the application of Alachua Broadcasters, Inc. (File No. BPH-871124MN) IS DENIED on the basis that it is not financially qualified to be a Commission licensee.

And IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Eve Ackerman (File No. BPH-871123MA) for authority to construct a new FM station or channel 223A in Alachua, Florida IS GRANTED; and that the applications of Wayne G. Fields and Geraldine Y. Miller d/b/a L.L. Broadcasting (File No. BPH-871124ME), and Brent L. Harmon and Elvin L. Harmon d/b/a Harmon Broadcast Partners (File No. BPH-871124MQ) ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The application of Charley C. White and Gregory G. Perich was dismissed with prejudice by an *Order*, FCC 90M-708, released on April 4, 1990 and that of Lynn T. Rivers and James S. Rivers III by *Order*, FCC 90M-251, released on August 15, 1990.

[2] These activities include:

March 1988 and 1989 -- Workshop participant, Teenage Pregnancy Prevention Program.

1988, 1989, 1990 -- Member, Board of Directors of the City of Gainesville Chamber of Commerce.

1987, 1988 -- Member, Board of Directors of the Mental Health Association of Alachua County.

1989 -- Member, Board of Directors of the "Sorts Organizing Committee", which attempts to bring sports events to the area.

1990 -- President, Boys and Girls Club Parents' Association.

May 1990 -- Host of scholarship fund event for the "Men of Tomorrow" program of the Eta Phi Beta Service Sorority.

May 1989 and 1990 -- A chaperon for community youths who travelled to Florida A&M University as part of the College Experience program sponsored by the Center of Excellence.

1988 and 1989 -- Master of Ceremonies and a speaker for a fundraising affair conducted by the Black Student Union of the University of Florida.

1979 -- Host of the pledge drive for noncommercial educational station WUFT-TV, Gainesville.

1984-1986 -- Member, Neighborhood Advisory Board (by appointment of the City Commissioners), providing advice from the community's perspective to the Gainesville City Council.

1987 and 1988 -- Master of Ceremonies (1987) and judge (1988) for an event sponsored by the Delta Sigma Theta Sorority Scholarship Fund.

March 1988 -- Master of Ceremonies for a fundraising event sponsored by the Kappa Alpha Psi Fraternity Scholarship Fund.

Summer 1988 -- Participant, Aids Prevention Program.

Summer 1990 -- Talent show host, Upward Bound College Program.

During 1988, 1989 and 1990, he has been a founder, the president, and a key participant in the activities of WONE, Inc., a non-profit group which works extensively to address problems in the Black community, concentrating on issues of importance to youth. WONE had been operated as a for-profit company until 1988, when it was determined that non-profit operation was more appropriate in light of the frequency and type of community activities conducted and the fact that the organization served so many people. Through the non-profit WONE, Inc., Mr. Fields has personally been actively involved in the following activities:

January 15, 1989 and 1990 -- A coordinator of a march and speakers' presentations, Martin Luther King Commemorative Celebration.

March 1990 -- An organizer, All-American Sport-A-Thon.

September 1989 -- An organizer, African American Music Festival.

October 1989 -- An organizer, "Musical Affair", a community cultural event directed toward youth.

Summer 1989 -- An organizer, Project Heatwave, a summer drug prevention program.

June 1988-1990 -- WONE, Inc. donated the use of a sound system for "Lap Around the Library", a program of the Alachua County Library.

Summer 1989 -- Participant, Aids Prevention Program. In 1989 the Program was sponsored by the Black-on-Black Crime Task Force, and Mr. Fields participated as a member of WONE, Inc.

May 1989 -- Participant in a program at the A. Quinn Jones School to provide entertainment for children who are autistic or have discipline problems.

August 1990 -- An organizer of the Athletes' ACT/SAT Workshops scheduled for this period and designed to help prepare student athletes for college entrance testing.

January 15, 1985-1988 -- A coordinator of a march and presentations by speakers for the Martin Luther King Commemorative Celebration.

October 1985-1988 -- An organizer of "Musical Affair", a community cultural event which was designed to convey a message concerning the community to its youth.

Summer 1988 -- an organizer of Project Heatwave, a summer drug prevention program.

May 1988 -- A participant in a program at the A. Quinn Jones School to provide entertainment for children who are autistic or have discipline problems.

March 1986-1987 -- Provided sound system and was Master of Ceremonies for the Job Corps Fun Run.

March 1980-1988 -- An organizer of the All-American Sport-A-Thon.

October 1980-1984 -- An organizer of "Musical Affair", a community cultural event which was designed to convey a message concerning the community to its youth.

1980 or 1981 -- Provided entertainment for physically and mentally retarded children at the Sunland Training Center.

Summer 1980 -- Assisted in the Robert Scott Scholarship Drive at the University of Florida.

April 1989 -- Organized, hosted, and provided equipment fo the Archer Community Festival, sponsored by he Archer Community Progressive Organization.

March 1988-1989 -- Provided the use of a stage to the March of Dimes Walk-A-Thon.

Summer 1982-1983 -- Gave a scholarship and hosted a talent show for the Upward Bound college program.

March 1986-1987 -- Provided the use of sound equipment and hosted the Institute of Black Culture Spring Festival.

[3] These activities include:

(a) 1977-present -- International Service Sorority, Alpha Kappa Alpha, Inc. (AKA), Gainesville chapter (includes Alachua County):

President -- 1986 and 1987.

Vice President and Program Director -- 1978-1985.

Selected as Soror of the Year -- 1988.

As member and officer of AKA, Ms. Miller has organized and/or participated in numerous civic and charitable activities. Some of these include:

1986-1987 -- Children's story hour: read stories to children in local nursery schools.

1978-1985 -- Attended and organized annual AKA meeting for senior high school girls in order to promote an interchange respecting educational advancement, scholarships and career goals.

1981-1982, 1985-1986 -- Young People's Concert Program. Helped provide transportation for local elementary school students to attend concerts series at the University of Florida (Gainesville) by the Alachua County Youth Orchestra and University performers.

1986-1987 -- The Ivy Climbers. AKA selected talented children to put on musical, dance and drama performances for the community. She rehearsed with students in 1986 and was the mistress of ceremonies for the performance in 1987.

1979-present -- Health Care Activities. She participated in several educational health care events conducted by AKA including:

1986 -- Sickle Cell Anemia Workshop.

1985-1986 -- Distributed informational brochures about cancer and conducted an educational meeting.

1987-present -- Dental Health visits. Presents dental kits and assists the dentist at local day care centers.

1988-present -- Participates in annual health fairs.

1986 -- Heart clinics. Organized clinics which tested for cholesterol and hypertension in connection with local churches and medical interns from the University of Florida.

1979, 1986-1987 -- Convalescent centers. Collected gifts for distribution at convalescent centers, visited patients, was accompanist for sing-a-longs and a bingo caller.

1987-1989 -- Teenage Pregnancy Workshops. Helped organize the 1987 and 1988 workshops. Registrar for the 1988 and 1989 workshops.

1977, 1980 -- Clothes bank. Collected and distributed clothes to the needy in annual drive.

1977-present -- NAACP membership drive. Participates in annual membership drive for the NAACP local chapter.

1982-present -- Day care center adoptions. Organized and attended Easter egg hunts and arranged for Christmas toy donations for local day care centers which AKA has "adopted."

1979-present -- Thanksgivings collection. Collects canned goods for Thanksgiving baskets for the needy and organizes the food program.

1986-89 -- March of Dimes Walk-a-thon. Helped organize sororities' and fraternities' support and participated in benefit marches.

1987-1988 -- Promoted and organized trips for high school students to historically black colleges.

1977-present -- AKA Scholarship. Activities conducted in order to benefit the AKA scholarship fund included the following:

1977-present -- Organizes, prepares decorations for, and attends an annual benefit dance.

1988 -- The Hal Jackson Teenage Talent Contest. Helped screen teenage contestants and helped contestants rehearse for a talent show benefitting the scholarship fund.

1979-1985 -- Other fundraising activities. Participated in car washes, dinners, and dances to raise money for the scholarship fund.

1987 -- Assault on Illiteracy Program. Participated in tutorials in tutorials in reading, writing and mathematics.

1986-1988 -- Voter Registration Program. Provided information and assistance respecting voter registration in a citizen education program.

1988 -- Martin Luther King Memorial. Participant in a fundraising drive for a Gainesville memorial honoring Dr. King.

(b) 1984-present -- The Links, Inc. (the Links), Gainesville chapter (covers Alachua):

Recording Secretary -- 1984-1986.

Financial Secretary -- 1987.

As a member and officer of the Links, she has organized and/or participated in numerous civic and charitable activities, including:

1986-1987 -- SAT tutorials. Conducted test-taking tutorials to aid students preparing for the Scholastic Aptitude Test.

1988 -- Special Olympics. Helped provide promotional T-shirts for that event, which the Links sponsored in 1988.

1988 -- Art Linkage Program. Organized and implemented program to bring the arts to culturally deprived students at Santa Fe High School, which includes students from Alachua.

(c) 1959-present -- The Visionaires:

President -- 1970.

Recording Secretary -- 1981-1985.

Program Director -- 1982-present.

The Visionaires is an unincorporated association of local minority professional women, including women from Alachua, dedicated to improving the quality of life for minorities through charitable drives, voter registration and cultural presentations. As a member and officer of the Visionaires she has organized and/or participated in numerous civic and charitable activities, including:

1986-present -- Developing Leadership Potential. Organized, promoted and attended workshops designed to encourage minority students to become leaders.

1988 -- Self-Defense for Women. Organized, promoted and attended this workshop, conducted in cooperation with the Gainesville police department.

1985 -- C.P.R. Workshop. Organized, promoted and attended this workshop conducted in cooperation with the local Red Cross.

1988-1989 -- Cultural presentations. Organized, promoted and served as the publicity chair for two concerts benefitting the Visionaires' scholarship fund.

1970-1972 -- Organizer, scriptwriter and mistress of ceremonies for fashion teas conducted to benefit the Visionaires' scholarship fund.

(d) Greater Bethel African Methodist Episcopal Church:

1959-present -- Member.

1989-present -- Co-chair, Educational Committee for Young People, which maintains a scholarship fund and conducts educational programs.

As an active church member, her activities also include:

February 1990-present -- Organizes, and teaches the Male Ensemble, in weekly rehearsals.

May 1990-present -- St. Francis House. Member of a group supporting this shelter for the needy.

1985-present -- Women of Allen Church Club. Participates in monthly meetings respecting church activities, including promoting and planning activities for young people.

(e) 1987-present -- Florida Arts Celebration of 1,000 Voices Concert:

Chair and Co-chair -- 1987-1988.

Steering committee member -- 1989.

She has been actively involved with organizing and conducting rehearsals for this annual concert featuring church members from throughout Alachua County.

(f) National Association for the Advancement of Colored People: Member of the local chapter (covering Alachua) for at least 30 years.

(g) Local theatrical events: Volunteer vocal coach of "Hello Dolly" in 1974 and volunteer director and producer of "Bye Bye Birdie" in 1969. Both plays were performed at local high schools.

[‡] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Application of

WARREN TELEPHONE COMPANY — File No. W-P-C-6635

To construct and operate cable television facilities within its telephone service area, under the "rural area" exemption of Title VI of the Communications Act of 1934.

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1991; Released: September 9, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Bureau is the application of the Warren Telephone Company ("Applicant") for authority under 47 U.S.C. § 214 (a) to construct and operate, through an affiliate, cable television facilities in its service area known as the Town of Warren, Knox County, Maine. Applicant alleges that because the Town of Warren is a "rural area" as defined by 47 U.S.C. § 533 and 47 C.F.R. § 63.58, the Applicant is exempt from the cable-telephone cross-ownership restrictions of 47 U.S.C. § 533 and 47 C.F.R. § 63.54, thereby entitling Applicant to simplified § 214 consideration under 47 C.F.R. § 63.09.

2. Petitions to deny the application were filed by United Video Cablevision ("United Video"), Community Antenna Television Association ("CATA"), New England Cable Television Association and the National Cable Television Association ("NCTA") (collectively," Respondents"). Applicant responded, and additional statements on behalf of the Applicant were filed by the National Telephone Cooperative Association, and by the Town of Warren's mayor and four of its five selectmen. United Video replied to the Applicant's response, and to the selectmen's resolution. For the reasons stated herein, we deny the petitions to deny and grant the application.

II. CONTENTIONS

3. Applicant asserts that as a New England town, the Town of Warren is specifically exempted from the Census Bureau's definition of "urban," and is, therefore, "rural," notwithstanding the fact that the Town of Warren is incorporated, and has a population in excess of the 2,500 figure designated in 47 C.F.R. § 63.58.[1] Section 63.58 specifically refers, says the Applicant, to the Census Bureau for "all population statistics and definitions used in qualifying for this exemption...." *Application of Warren Telephone*, at 3 (*"Application"*); 47 C.F.R. § 63.58(b).

4. Respondents assert the Commission intended that all towns be considered "places" for purposes of Section 63.58(a)(1), and that "all population centers of 2500 or more" are urban and, hence, excluded from the rural exception. The 2500 population figure, they state, is the sole dividing criteria between urban and rural. *United Video Opposition To and Petition To Deny*, at 3 (*"United Video Opposition"*); *NCTA Opposition and Petition to Deny*, at 4 (*"NCTA Opposition"*). Granting an exemption in this case, say respondents, would violate the underlying rationale of the rural area exemption, would strain interpretation of the Commission's rules, and would cause an unintended aberration. Technical distinctions in census language between New England towns and other "incorporated places," say respondents, pertain more to the history of municipal governance and contemporary census classification needs than to the thinking implicit in the Communication Act's rural area exemption. *United Video Opposition*, at 2, fn. 4; *NCTA Opposition*, at 4, 5. Respondents also state that the § 214 requirement of "public convenience and necessity" has not been demonstrated because, among other reasons, alternative cable service authority already exists for the Town of Warren. *United Video Opposition*, at 4.

III. DISCUSSION

5. In *Elimination of the Telephone Company Cable Television Cross-Ownership Rules, Sections 63.54-63.56, for Rural Areas*, CC Docket 80-767, 88 FCC 2d 564 (1981) *(R&O)* [*"Rural Exemption Order (1981)"*], the Commission first decided to specifically exempt rural areas from the telephone-cable cross-ownership rules. In defining "rural area," the Commission stressed that the definition must be "easily identifiable and verifiable," and administratively expeditious. *Id.* at 565 ¶ 4. After rejecting definitions based solely on population density and television markets, the Commission decided to rely on the definitions of "rural" established by the Census Bureau. *Id.* at 574 ¶ 36. The Commission, thus, codified the Census Bureau's definitions of urban area, and all remaining areas were exempt from the cross-ownership prohibition as rural areas. *See* 47 C.F.R. § 63.58. The rule's language has been applied in several cases. *Ardmore Telephone Co., Inc.*, 56

[1] § 63.58 provides that:

(a) A telephone common carrier shall be exempt from the provisions of §§ 63.54 through 63.56 if the proposed service area contains none of the following:

(1) Any incorporated place of 2,500 inhabitants or more, or any part thereof;

(2) Any unincorporated place of 2,500 inhabitants or more, or any part thereof;

(3) Any other territory, incorporated or unincorporated, included in an urbanized area.

RR 2d 611, at ¶ 7 (1984) (*"Ardmore"); Eagle Telecommunications, Inc.*, 59 RR 2d 1243 (1985) [*"Eagle Telecommunications (1985)"*].

6. Moreover, the rural area exception to the cross-ownership prohibition became law in the *Cable Communications Policy Act of 1984*. Pub. L. No. 98-549, 98 Stat 2779 (1984), at § 613(b)(3); 47 U.S.C. § 533(b)(3). The legislative history of the act underscores the desire of Congress to eliminate "all legal or administrative barriers preventing a common carrier from providing rural cable television service, except the need to certify to the FCC that it is serving a rural area." *House Committee on Energy and Commerce, HR Rep. No. 943, 98th Cong., 2nd Sess. (1984)*, p. 56 (*"House Report"*). The legislative history, as reflected in the *House Report*, also expressly provides that the statutory "rural" exemption "overrides" the Commission's former rule, which precluded a rural exemption if a cable television system is under construction or in existence in the proposed service area. The *House Report* further explains that the "FCC's role in telephone company provision of cable television service in rural areas is limited to defining 'rural area' and certifying that the particular service area of a telephone company is a rural area under that definition." *Id.* p. 57 In *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, CC Docket 84-1296, 58 RR 2d 1 [*"Amendment of Parts (1985)"*], the Commission, noting that Congress left the definition of rural areas to the Commission, decided to leave intact its current definition of rural area, stating, "There is no indication that Congress disapproves of the Commission's current definition." *Id* . at 19 ¶ 68.

7. On its face, the rural area exception at 47 C.F.R. § 63.58 mandates that "All... definitions used in qualifying for this exemption shall be... from the Bureau of the Census." 47 C.F.R. § 63.58(b). This requirement means that the terms used in Section 63.58 must be defined in the same manner as by the Census Bureau. These terms include the words "place," "incorporated place," and "urbanized area," all words that the Census Bureau specifically and formally defines with each new census. *Application* (*"Application"*), Attachment A, 1980 Census Area Classifications; *1990 Census Report*, Appendix A: Area Classifications at A-1 (*"1990 Appendix"*). The Section 63.58(b) requirement that the definitions be "the most recent available" from the Census Bureau, thus, is an acknowledgment by the Commission that the definitions will not remain static, that they will change from time to time, and that, unless otherwise specified, the Commission will defer to the Census Bureau for the current meanings of terms.[2]

8. Therefore, by its plain language, and consistent with prior interpretations, *see* para. 12, *infra*, Section 63.58 must be read in conjunction with the Census Bureau's definitions. Census Bureau documents in effect when Section 63.58 was adopted, as well as the *1990 Census Report* language, explain that "Territory, population and housing units not classified as urban constitute 'rural.'" *1990 Appendix*, at A-11. There are three Census Bureau categories of urban. *Id.* These three categories are reflected in the three-point criteria of the Commission's rules at 47 C.F.R. § 63.58(a)(1), (2), (3).

9. The Town of Warren is a New England town, incorporated in 1776, with a 1990 census population of 3192. *Population Totals, State of Maine, 1990 Census*, Bureau of the Census, Department of Commerce, Form D-69, p. 8. Having a population of 2500 or more, alone, does not remove the Town of Warren from the "rural" category for Section 63.58 purposes. Within the first urban category is "any incorporated place of 2500 inhabitants or more, or any part thereof...."However, the 1970, 1980 and 1990 Census Reports specifically exclude the towns in New England from its definition of the term "incorporated place." Thus, although the Town of Warren might otherwise be included in the first "urban" category of Section 63.58, it has been excluded by the Census Bureau's own definition of "incorporated place" for purposes of classifying it as an urban area. *1990 Appendix*, at A-10; *1980 Census Report*, Appendix, at A-2 (*"1980 Appendix"*).

10. Nor is the Town of Warren included in the second "urban" category. The Commission's rules describe this second category of urban areas as "unincorporated places" with populations of 2500 or more. In its *1980* and *1990 Census Reports*, the Census Bureau explains that the term "unincorporated place," formerly used in pre-1980 *Census Reports*, is synonymous with the term "census designated place" (CDP), used by the Census Bureau since 1980 to define the second category of urban places. (Indeed, the term "unincorporated place" apparently is no longer used.) *See 1990 Appendix*, at A-9; *1980 Appendix*, at A-2.[3] Only towns designated as CDPs fall[4] within the second category, and, as the Applicant points out, the Town of Warren has not been designated a "CDP." Therefore, it does not fall within the second category.

11. Finally, as all parties apparently concede, the Town of Warren is not included in the last of the three exceptions, as an "urbanized area." There are only three "urbanized areas" in Maine according to the 1980 Census,

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[2] The only departure from the Census Bureau language noted by the Commission is in the "Note" at the end of Section 63.58 on "extended cities."

[3] The towns of New England, thus, are neither incorporated places nor CPDs; the *1990 Appendix*, instead, classifies these New England towns as "minor civil divisions." *1990 Appendix*, at A-10. We note that CDPs are comprised only of densely settled "unincorporated" places, which have been specifically designated by the Census Bureau, *see 1990 Appendix* at A-9, thus explaining why the Census Bureau formerly described them as unincorporated places. In any event, it is clear that the Census Bureau's current use of the term CDP, instead of the old term "unincorporated place," reflects only a change of terminology, and not of substance. *See id.*

[4] We also have no reason to believe that the exclusion of New England towns from the definition of urban areas is based on "mere semantics" of the Census Bureau's definitions, as CATA suggests. The exclusion of these New England towns from the definition of urban areas is express and deliberate. As the Applicant points out, the Commission has recognized that Census Bureau determinations take into account population density, as well as total population, in distinguishing between urban and rural areas. The express exclusion of towns in New England (as well as towns in New York and Wisconsin) from the Census Bureau's first category of urban places presumably takes into account such factors. Indeed, the Applicant notes that the outlying areas of the Town of Warren have very low population density. Further, where appropriate, the Census Bureau may designate New England towns as "urbanized areas" (under the third category), but it has not done so in the case of Warren.

the latest available census information, and none of the three areas includes the Town of Warren. *Application*, at Appendix D; *1990 Appendix*, at A-12. Since the Town of Warren does not fit within any of the three urban categories, it is rural. *1990 Appendix*, at A-11.

12. Respondents cite the *Rural Exemption Order (1981)*, *Ardmore*, and *NCTA v. FCC (1984)*, at 1507 , as evidence that the Commission relies on specific population numbers as the sole criteria to define "rural." *United Video Opposition*, at 3, 4. In *Rural Exemption Order (1981)*, at 574 ¶ 34, the Commission referred to population size in an "area" as a criterion, but made clear, at ¶ 36, that it was "adopting an exemption for areas which are defined as rural by the Census Bureau." The Commission again emphasized this in its order in *Ardmore:* "Indeed, we stated explicitly in that order that the definition of 'rural area' would comport with the definition used by the Census Bureau...." The decision in *NCTA v. FCC (1984)*, at 1507, is not to the contrary. The court there merely reiterates the *Rural Exemption Order (1981)*, and only generally describes the order's contents and the Census Bureau's definition. The decision does not purport to rule on the specific issue before us. Finally, the Commission more recently described its standard not merely as "places of less than 2500 inhabitants," but as "places of less than 2500 inhabitants *as defined by the Bureau of the Census*" (emphasis added). *Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 FCC Rcd 5849 (1988) (*1988 FNI & NPRM*), at ¶ 8; 47 C.F.R. § 63.58(b).

13. Because the Applicant is seeking § 214 authorization under the narrow provisions of 47 C.F.R. § 63.09, additional issues raised by respondents need not be addressed in detail. These issues pertain to the presence of other cable services in the Town of Warren, matters of "over-building" and "cross-subsidization," and other issues of public convenience and necessity. *United Video Opposition*, at 4; 10, fn. 17, citing *Rural Exemption Order (1981); United Video Reply to Warren Telephone Company's Opposition to Petitions to Deny and Response to Oppositions*, at 2, 3. As explained above, consistent with the clear congressional intent underlying the Cable Communications Policy Act of 1984, Section 63.09 no longer uses such criteria in determining whether the rural exemption applies. *Amendment of Parts (1985)*, ¶¶ 59, 60, 67; *1988 FNI & NPRM*, at 5851 ¶ 8; *Eagle Telecommunications (1985)*, ¶¶ 13, 14; *House Report*, at 56.

14. Finally, Respondents challenge the Town of Warren franchise granted to the Applicant's affiliate, Warren Cable Company ("Warren Cable"), because, say Respondents, there is no written record of the approval of the formation of Warren Cable by the State of Maine Public Utilities Commission. This is not an issue for this proceeding. We presume the validity of a franchise, until a local forum resolves the issue otherwise. As stated in *Paragon Cable Television, Inc. v. FCC*, 822 F. 2d 152 (D.C. Cir. 1987) ("*Paragon*"), until a local franchise dispute is resolved,"... it is appropriate for the Commission to employ a presumption of validity with respect to the franchising authority's actions *vis-a-vis* the franchise." *Paragon*, at 154. In any event, Applicant has met the requirements of our rules, and Respondents have not shown that grant of the application is not in the public interest.[5]

IV. CONCLUSION

15. We find that the Applicant has met the requirements of 47 C.F.R. § 63.09, in that the Town of Warren is a "rural area" according to the Census Bureau, and, hence, according to § 63.58. We find the public convenience and necessity are served by grant of the application. Applicant is therefore entitled, under the provisions of 47 U.S.C. § 214, to construct and operate, through an affiliate, cable television facilities in the Town of Warren, Knox County, Maine.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the application of Warren Telephone Company under § 214 of the Communications Act of 1934, as amended, to construct and operate cable television facilities in the Town of Warren, Knox County, Maine, IS GRANTED.

17. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

18. Warren Telephone is afforded thirty-one days from the release date of this order to decline this authorization. Failure to respond within that period will constitute formal acceptance of this authorization.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common
Carrier Bureau

[5] According to a statement in the record signed by four of the five Selectmen of the Town of Warren, only 20% of the town is served by cable, even after nine years of a fifteen-year franchise with respondent United Video. *Resolution of the Board of Selectmen of the Town of Warren*. United Video responds that the service figure is "over 30%."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-91-165

Application for authority to acquire and operate seven Digital Circuit Multiplication Equipment (DCME) terminals.

ORDER AND AUTHORIZATION

Adopted: August 30, 1991; Released: September 9, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-165 IS GRANTED and GTE Hawaiian Telephone Co., Inc., (HTC) is authorized to:

a. acquire and operate seven Digital Circuit Multiplication Equipment (DCME) terminals; and

b. use these facilities to provide HTC's regularly authorized services between Hawaii and the following points:

Country	No. of Terminals
Australia	1
Japan	2
Korea	1
Philippines	2
Saipan	1

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-20

In re Application of

SAM WIDGE ADVERTISING LIMITED PARTNERSHIP — File No. BPH-890713MI

For Construction Permit for
New FM Station, Channel 264C,
Wallace, ID.

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1991; Released: September 9, 1991

By the Review Board: MARINO (Chairman) and ESBENSEN. Board Member BLUMENTHAL absent.

1. The Review Board has before it for consideration an appeal filed July 22, 1991 by Sam Widge Advertising Limited Partnership (Widge) from the *Memorandum Opinion and Order*, FCC 91M-1941, released June 20, 1991 by Administrative Law Judge Edward J. Kuhlmann (ALJ), which dismissed Widge's application with prejudice and terminated the proceeding.

2. The *Hearing Designation Order*, 6 FCC Rcd 882 (1991) in this proceeding set the applications of Widge and Darrell E. Bauguess for hearing on the standard comparative issue and a contingent environmental impact issue against Widge. Widge was also directed to file an amended EEO program with the ALJ. Subsequently, the applicants filed a settlement agreement providing for dismissal of Bauguess' application in exchange for a $2,000 payment by Widge. In the *Order* under review, the ALJ approved the settlement (which was not contingent on grant of Widge's application) and dismissed Bauguess' application. However, the ALJ declared that Widge's application could not be granted because it would first be required to pay the hearing filing fee before the outstanding issues against it could be resolved. The ALJ noted that Widge had not yet paid the fee, and had, instead, requested deferral of the fee from the Managing Director pursuant to 47 CFR § 1.1115. The ALJ further recited, however, that his office informed Widge on May 15, 1991 that the Commission had no record of its request for deferral, and that although on May 28, 1991 Widge submitted to the ALJ an undated letter (absent any Commission date stamp) which purported to be a copy of a February 26, 1991 letter to the Managing Director requesting a deferral, further inquiry to the Docket Branch, the Managing Director's Office, and the Office of General Counsel produced no evidence of Widge's deferral request. Thus, in view of the nearly six month delay since the case was set for hearing on January 25, 1991, the outstanding issues against Widge, and its apparent unwillingness to comply with the fee requirements, the ALJ concluded that Widge's application should be dismissed for failure to prosecute. The instant appeal ensued, in which Widge seeks reinstatement of its application pending a decision by the Managing Director on its request for fee deferral.

3. We will grant the subject appeal and conditionally reinstate Widge's application subject to, and specifically contingent upon, further action by the Managing Director's Office on Widge's fee deferral request. Widge has submitted with its appeal a copy of its March 4, 1991 Notice of Appearance which indicated that a settlement agreement with Bauguess had been arranged and that, consequently, a deferral of the hearing fee was being requested.[1] Widge claims that filed with the Notice of Appearance (and submitted to the Board as attachments to the instant appeal), were the settlement documents, a proposed amendment addressing the environmental and EEO issues pertaining to its application, and a February 26, 1991 letter from John H. Wiegman, Widge's owner, to the Managing Director, requesting deferral of the hearing fee. The Notice of Appearance, which contains an express request for deferral of the filing fee, bears a date stamp showing it was received in the Secretary's Office on March 4, 1991. Although the accompanying documents, including the February 26, 1991 letter requesting deferral, are not date-stamped, we accept Widge's explanation that they were attached to the Notice of Appearance as originally filed on March 4, 1991. In this regard, we also note that the Chief, Mass Media Bureau concurs that Widge requested deferral of the fee, and the Bureau has provided the Managing Director's Office with a copy of the March 4 Notice. *See* Mass Media Bureau Comments on Request for Permission to File Appeal, filed April 5, 1991, at p. 4, n. 1; and Mass Media Bureau Comments on Joint Request for Approval of Settlement Agreement, filed March 19, 1991, at p. 1, n. 1.[2]

4. The Commission has delegated exclusive authority to rule on requests for deferral of the hearing fee to the Managing Director (with the concurrence of the General Counsel). 47 CFR § 1.1115(c). Accordingly, and pursuant to the Commission's directive to the Board in *CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990), not to summarily dismiss fee deferral appeals, but rather to direct them to the appropriate Commission authority, we hereby refer Widge's fee deferral request to the Managing Director for further action. Although we have conditionally reinstated Widge's application pending such action, the ultimate fate of Widge's application in this regard must depend on the Managing Director's ruling.

5. ACCORDINGLY, IT IS ORDERED, That the Appeal of Dismissal of Application filed July 22, 1991, by Sam Widge Advertising Limited Partnership IS GRANTED; and that this matter IS REFERRED to the Commission's Managing Director for appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The Commission's rules provide that the hearing fee must accompany a written notice of appearance at the time it is filed, or a request for waiver or deferral of the hearing fee. 47 CFR § 1.221(f), (g). Such a request may be granted upon a showing of good cause and where the waiver or deferral would serve the public interest. 47 CFR § 1.1115(a). The Note to 47 CFR § 1.221 also provides that the hearing fee need not accompany the notice of appearance if the parties are also filing a settlement agreement.

[2] Out of an abundance of caution, however, in view of the ALJ's concern that the fee deferral request has not been officially made, we are making available to the Managing Director's Office copies of the materials filed with the Board by Widge.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-354

In re Applications of

JEANNE T. HAEFNER File No. BPH-880727MC

CAPE BROADCASTING CORPORATION File No. BPH-880728NM

For Construction Permit for a
New FM Station on Channel 294A
in North Cape May, New Jersey

Appearances

Kathryn R. Schmeltzer, Esq. and *Matthew Zinn, Esq.* on behalf of Jeanne T. Haefner; *John P. Bankson, Esq.* and *Elizabeth A. Marshall, Esq.* on behalf of Cape Broadcasting Corporation; and *Charles E. Dziedzic, Esq.* and *Y. Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: August 30, 1991; Released: September 11, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of two surviving applicants:[1] Jeanne T. Haefner ("Haefner") and Cape Broadcasting Corporation ("CBC"). These two applicants are competing for the award of a permit to construct a new FM Station on Channel 294A at North Cape May, New Jersey.

2. The *Hearing Designation Order* ("*HDO*") DA 90-1023, released August 23, 1990, reported at 5 F.C.C. Rcd 5265, (MM Bur. 1990) and published at 54 Fed. Reg. 35182 (released August 28, 1990) sets the air hazard and standard comparative issues for adjudication as follows:

> (a) To determine whether there is a reasonable possibility that the tower heights and locations proposed by Haefner and CBC would constitute hazards to air navigation.
>
> (b) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (c) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The party applicants have the burdens of proving their proposals by a preponderance of the evidence. *Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). *See also Steadman* v. *SEC*, 450 U.S. 91 (1981).

3. On September 24, 1990, Haefner filed an Amendment as a matter of right to reduce her proposed antenna-tower height. By *Order*, FCC 90M-3513, released November 6, 1990, the Judge accepted Haefner's amendment. In a *Memorandum Opinion and Order*, FCC 91M-850, released March 5, 1991, the Judge granted Haefner's Motion for Summary Decision that she filed on February 4, 1991, and resolved the air hazard issue in Haefner's favor subject to a condition that Haefner must take such corrective action as is necessary to eliminate any harmful interference.

4. On March 15, 1991, CBC filed a Motion for Summary Decision of the air hazard issue and by *Order* FCC 91M-1242, released April 10, 1991, the Judge granted CBC's motion and resolved the air hazard issue in its favor subject to the same condition concerning harmful interference that was contained in the previous *Order* pertaining to Haefner.

5. A prehearing conference was held on October 30, 1991 and the trial was conducted on June 4, 1991. The record was closed on June 4, 1990. The parties were directed to file Proposed Findings Of Fact And Conclusions Of Law ("PFC") by July 8, 1991, and to file Reply Proposed Findings Of Fact and Conclusions Of Law ("RPFC") by July 26, 1991. *See Order*, FCC 91M-1817, released June 6, 1991. The Mass Media Bureau filed its PFC on July 12, 1991, limited to the comparative coverage issue.

6. Testimony is cited where practicable with reference to the name of the witness followed by the transcript page number (*e.g.* Smith, Tr._____). References to exhibits are made to the numbered exhibits of each applicant that were admitted into evidence. References to proposed findings and conclusions are introduced by "PFC" and to replies by "RPFC."

FINDINGS OF FACT

7. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues remaining for trial wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325 U.S. 327, 333 (1945); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Standard Comparative Issue

8. The matters for determination under the standard comparative issue are whether the applicants' coverage proposals reflect any significant difference in the size of the areas and populations which would receive service from the proposals [*HDO* at Para. 6]; which of the integration proposals would, on a comparative basis, best serve the public interest [*HDO* at Para. 8(2)]; and, in light of the evidence adduced relating to those issues, which of the applications should be granted [*HDO* at Para. 8(3)]. *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Media Diversification

9. Neither Haefner nor CBC owns an attributable interest in a means of mass communications. Therefore, neither party receives a diversification credit or demerit. *Policy Statement On Comparative Broadcast Hearings, supra* at 394-95.

Comparative Coverage

10. The parties were required to submit evidence on comparative coverage for consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity. The findings are based on Joint Engineering Exh. 1 that was received in evidence on June 4, 1991 (Tr. 19).

11. The following are the areas and populations which the two applicants will cover within their respective 1.0 mV/m contours:

Applicant	Population	Area (sq. km)
Haefner	49,845	277
CBC	53,324	367

CBC's service exceeds Haefner's by percentage factors of 6.5% (population) and 24.5% (area). Both prospective service areas have five or more fulltime primary aural services. (*Id.*)

Best Practicable Service

Jeanne T. Haefner

12. Ms. Haefner, a caucasian female, has prosecuted her application as an individual applicant. (Haefner Exh. 1 at 1.) She proposes to work full-time as the station's General Manager. In that position, she will supervise construction, develop station policies, maintain communications with the local community, develop programming relevant to the community, and assume responsibility for hiring personnel. (Haefner Exh. 1 at 1-2.)

Employment

13. Haefner is presently employed as a real estate agent. She has timely committed to leave that employment and any business pursuits that require her time and attention in order to effectuate her full-time integration commitment to the North Cape May FM station. She made that decision to leave the real estate business when she filed her application. Her decision was reflected in her Integration and Diversification Statement. (Haefner Exh. 1 at 2; Tr. 36-7.)

Local Residence

14. Ms. Haefner resides at 10 South Dennis Road, Cape May Courthouse, New Jersey. (Haefner Exh. 1 at 2; Haefner, Tr. 22.) She was born and raised in Cape May County and resided in the county until 1964. Prior to 1964, Ms. Haefner lived in Green Creek approximately six (6) miles from North Cape May. North Cape May developed while she was a child. (Haefner, Tr. 39.) She returned to the area in 1980. Since then she has resided in Cape May Court House which is within the 60 dBu contour of her proposed station. Ms. Haefner intends to continue to reside in Cape May Court House. (Haefner Exh. 2 at 2; Haefner, Tr. 39.) This evidence establishes that Ms. Haefner has resided in the area of coverage for more than 11 years but that she has not resided in the local community of North Cape May.

Civic Activities

15. Ms. Haefner has been involved in civic activities within the 60 dBu contour of her proposed station for several years preceding the filing of her application and continuing to the present. For the last 3 1/2 to 4 1/2 years, she has been active as a member of the Middle Township Chamber of Commerce. She has served by appointment on the Board of Directors of the Chamber since 1988. She attends monthly meetings of the Chamber. (Haefner Exh. 1 at 2; Tr. 45-46.)

16. Ms. Haefner has served on the Chamber's Annual Fish Dinner Committee, the chief fundraising event, for the last three years. She was also Co-Chairman of the January 1991 Installation Dinner. (Haefner Exh. 1 at 3.) For approximately eight years, Ms. Haefner has been a member of the Bayberry Twigs, a service organization affiliated with the Burdette Tomlin Memorial Hospital. Bayberry Twigs raises money for the hospital which is located in Cape May Court House and which is the only hospital in Cape May County. In 1988, 1989 and 1990, Ms. Haefner sold admission tickets for the Annual Antique Show, the major fundraiser conducted by the Bayberry Twigs. (Haefner Exh. 1 at 3.)

Auxiliary Power

17. Ms. Haefner will install auxiliary power generators at her studio and transmitter sites to ensure that her station will remain in operation in the event of a power failure. (Haefner Exh. 2; Tr. 48-9.)

Cape Broadcasting Corporation

18. CBC is a Delaware corporation authorized to do business in New Jersey. CBC represents that its stockholders, officers and directors are:

Number of Stockholder	Shares	Percentage	Offices
Eugene W. Boyd, Jr.	125	50%	President and Director
Betty Jean Boyd	125	50%	Secretary, Treasurer and Director

(CBC Exh. 1 at 1; CBC Exh. 2 at 1; Haefner Exh. 5.)

But there are no by-laws. (E. Boyd, Tr. 115.) Mrs. Boyd was erroneously disclosed in the Integration and Diversification Statement as a Vice-President which Mr. Boyd stated in his testimony was the result of a typing error. (E. Boyd, Tr. 142.) Nor are the Boyds listed as directors in Section II of Form 301. Mr. Boyd testified that he saw no need "to list it twice, us (sic) both as directors and officers." (E. Boyd, Tr. 145.) And although each is listed in Form 301 as owning 125 shares apiece of the voting stock, each person is treated as having only one vote because "it

was easier." (E. Boyd, Tr. 142-43.) It is concluded that the Boyds did not take seriously the corporate form of doing business.

19. This unconcerned attitude towards structure is explained by the current and the past business ventures in which the Boyds engaged together. They had operated a coffee service business as sole proprietors for 22 years from 1966 to 1988 and the same relationships between Eugene and Betty that prevailed then would be followed at the broadcast station. (E. Boyd, Tr. 131, 138.) While there were no titles assigned, Mr. Boyd had acted as general manager of the earlier enterprise. (*Id.*) So when she was deposed in January 1991, Mrs. Boyd testified that she had no knowledge of her assigned job titles at CBC. (B. Boyd, Tr. 192.) She confirmed in her deposition and at hearing that she would perform essentially the same duties at the station as she had performed for the coffee service, i.e., seeing that sales personnel got out on the road, overseeing accounts receivable, accounts payable, collections, and answering the telephone -- "that sort of thing." (B. Boyd, Tr. 192; Haefner Exh. 7 at 4.)[2] Even at the hearing, Mrs. Boyd was not able to articulate her managerial duties and functions; she was only able to account for her time as secretary/receptionist and bookkeeper. (B. Boyd, Tr. 194.)

20. And while she had described her duties as clerical at her deposition of January 1991, she was listed in the CBC Integration and Diversification Statement, which was prepared in October 1990, as "Operations Director" and "Business Manager." (B. Boyd, Tr. 190.) Those titles were assigned to her by her husband. The reason for her being assigned such titles she understood to be as follows:

> The decision [w]as made that these titles would be put here, because it was required procedure, that this was part of the procedure for applying for a station frequency.

(B. Boyd, Tr. 188, 190.) Since there is no substantial evidence in the record to establish that Mrs. Boyd will have managerial responsibility, or that her managerial titles had any intended operational validity, it is found as a fact that her duties will be limited to those that are clerical and secretarial.

21. Mr. Boyd is proposed in his written hearing exhibit to be the full-time General Manager and the Program Director.[3] (CBC Exh. 1 at 1.) Under the proposal, Mr. Boyd would be primarily responsible for programming, promotion and technical matters. (*Id.*) CBC represents further that he and Mrs. Boyd would together formulate policies and procedures for all aspects of the station's operations. (CBC Exh. 1 at 2.)

22. First, Mrs. Boyd's participation in managerial decisions has been rejected because she has been unable to articulate the managerial tasks assigned. (*See Para*, 20, *supra*; B. Boyd, Tr. 194-95, 202-03; CBC PFC at 8.) Second, Mr. Boyd is devoting a substantial amount of time to managing ten rental properties that are owned by the Boyds. Seven of those properties are in Arlington, Delaware and 3 are in Cape May County, New Jersey. (E. Boyd, Tr. 86-87.) One property is an office building and the other 9 are single family homes. (*Id.*) Boyd and his wife manage the properties and Mr. Boyd personally handles the bookkeeping, makes the mortgage payments, and pays the bills. Mr. and Mrs. Boyd are responsible together for handling the lease arrangements. They also together handle rental renewals and take care of cleaning, painting and general maintenance. (E. Boyd, Tr. 112-14.) The Boyds' daughter helps with cleaning chores from time to time. But she is not a regular employee and she does not participate in the business. (CBC Exhs. 1 and 2; CBC Exh. 4.) Mr. Boyd did state in his deposition that if the Boyds needed more time to run the station, they would sell the properties. But there was no affirmative statement made to that effect in CBC's Integration and Diversification Statement or in its direct written testimony, or in any formal filing with the Commission. (E. Boyd, Tr. 154.)[4]

23. In mitigation of the time devoted to the rental business, Mr. Boyd testified that the bookkeeping and billings are computerized and are very simple to administer. (E. Boyd, Tr. 112, 114.) He explained that there is no need for a regular monitoring of lease arrangements because the commercial property has a five year lease term and the one-year leases on the residential units automatically renew. (E. Boyd, Tr. 113.) Most tenants remain in their unit for periods of 4 to 5 years. (*Id.*) In addition to help from their daughter in the cleaning and maintenance, hired help is used and a recent son-in-law, who is a contractor, also lends assistance. (E. Boyd, Tr. 153-54.)[5] While all these circumstances do support a conclusion that the Boyds will not be engaged full-time in the rental business, there is still no showing of a formulated plan to extricate the Boyds from the business which will take considerable time and require hours of tending to unforeseen tenant needs. By continuing to engage in the rental property business as owner-manager, Mr. Boyd cannot be found to integrate himself 100% into the management and operation of the station.

Local Residence

24. CBC's Form 301 reports the Boyd's "residence" to be on West Spruce Avenue in North Wildwood, New Jersey [Part II, p. 2, item 1]. It also reports the corporate applicant address at the same West Spruce Avenue location [Section 1 - General Information]. But the testimonial evidence of the Boyds established that the West Spruce Avenue residence in Northwood, New Jersey is owned by Mr. Boyd's parents and that it is only occupied by the Boyds on a regular basis in the summer. At the hearing, Mr. Boyd disclosed in his testimony that he has a residence on Fairview Avenue, in Wilmington, Delaware, a home which he and Mrs. Boyd have owned for fifteen years. (E. Boyd, Tr. 73-74.) Prior to that, the Boyds had a residence on Laurel Avenue in Wilmington, Delaware. And prior to Laurel Avenue, Mr. Boyd resided with his parents on Wood Green Road in Claymont, Delaware. (E. Boyd, Tr. 73-74.)

25. Mr. Boyd also maintains an office at 5 East Lea Boulevard in Wilmington which he uses in connection with his rental property business. (E Boyd, Tr. 85-87; 112.) Mr. Boyd has been continuously registered to vote in Wilmington, Delaware since 1958. (E. Boyd, Tr. 73; Haefner Exh. 4.)[6] Mr. Boyd pays state income taxes to Delaware and CBC was incorporated as a Delaware corporation. The Boyds' daughter also attended the University of Delaware as a state resident student. The Boyds' residence given to the IRS for federal tax purposes is Wilmington, Delaware. (E. Boyd, Tr. 78.) These are all substantial indicia of a Delaware residence.

26. There are two adjoining residential units on West Spruce that are owned by Mr. Boyd's parents. (E. Boyd, Tr. 161.) His parents spend part of the year at West Spruce and they pay all of the real estate taxes. (E. Boyd, Tr. 81-82.) Mr. Boyd admitted that West Spruce is not a primary residence when he testified that " it was our summer residence." (E. Boyd, Tr. 143-44.) Mrs. Boyd confirmed that the West Spruce dwelling was used by the Boyds "during the summer." (B. Boyd, Tr. 181-182.) There were five summers during the 1970s when she stayed there for three months. (CBC Exh. 2 at 2.) For the more recent periods of time, she spent 4% of her time in North Wildwood from September 1988 to January 1991, and 60% of her time in Wilmington and since January 1991 to the present, the split has been closer to 70% of her time being spent in Wilmington. (B. Boyd, Tr. 178.) She admitted that in 1989 and 1990, she spent more time in Wilmington than in North Wildwood. (B. Boyd, Tr. 176-77.)

27. Mrs. Boyd admitted that the reason that the North Wildwood, New Jersey address was used in Form 301 was because it was "the address we had talked about using for this application." (B. Boyd, Tr. 206-07.) She further admitted that at the time that the application was filed, she and her husband were living the majority of the time in Wilmington but they wanted to show an identity with New Jersey. (B. Boyd, Tr. 207-08.) From the specific facts found in Paras. 24-27, it is ultimately found that Mr. and Mrs. Boyd have resided in Delaware and there will be no local residence credit accorded to CBC's application.

Civic Activities

28. Contingency findings are made on local civic activities to be credited to CBC in the event a reviewing authority should disagree with the above initial findings on local residence.[7] Prior to the filing of the CBC application, Mr. Boyd was not active in civic affairs in the North Cape May area. (E. Boyd, Tr. 121, 156.) In or about May 1990, he became Vice President of the United Way of Cape May County. In 1989, he also had been on the committee that allocated United Way Funds to the member agencies. He has been a board member of the New Jersey Cape Health Services since February 1990. (CBC Exh. 1 at 4; E. Boyd, Tr. 154-55.) CBC became a member of the Cape May County Chamber of Commerce Business Expo for the period September 1988-89. Mr. Boyd became a member of the Southern Shore Region Tourism Council and in 1991, he served as its Secretary. Mr. Boyd also has been a member of the Art League of Greater Cape May County since September 1988, as well as a member of the Marine Mammal Stranding Committee. (CBC Exh. 1 at 4; E. Boyd, Tr. 156-157.) CBC also is a member of the Chamber of Commerce of Greater Cape May. (CBC Exh. 1 at 4; E. Boyd, Tr. 157.) Mr. Boyd is a "volunteer" for the Cape May County Council on Alcoholism. (*Id.*)

Broadcast Experience

29. Contingent findings also are made with respect to Mr. Boyd's broadcast experience. Here Mr. Boyd made a timely pledge to terminate his present part-time employment at broadcast Station WCZN, Chester, Pennsylvania. (CBC Exh. 1 at 1.) He also previously worked part-time for Station WSJL, Cape May, New Jersey. (CBC Exh. 1 at 2.)[8] Mrs. Boyd is not represented as having any broadcast experience.

30. The dates of the broadcast experience of Eugene Boyd include the following. In October 1989, he left his coffee service business and was employed "on-call" by Station WCZN, meaning that if a regular employee became sick or went on vacation, Mr. Boyd might be asked to work in that person's stead. Prior to October 1990, Mr. Boyd worked at WCZN an average of two days each month. Between October 1990 and January 1991, Mr. Boyd was never called by the station. Between January 1991 and the hearing in June 1991, he worked 4 to 5 days in 4 hour (1/2 day) shifts. (E. Boyd, Tr. 127-28, 135.) He began working at Station WSJL in May 1989, where he also is "on-call."

31. His part-time work at WSJL includes production of a weekly community affairs program which was in production for about 1 1/2 years but which had not been broadcast for the six month period prior to the hearing. (CBC Exh. 1 at 2; E. Boyd, Tr. 129.) He also has developed and supervised Station WSJL's involvement in community events and organizations. (*Id.*) His part-time work at WSJL was estimated at 20 hours per week when he was working. (*Id.*) For a two week period in 1991, Mr. Boyd was acting station manager. (E. Boyd, Tr. 135.) Mr. Boyd's part-time work at Station WCZN was as sales consultant and announcer where he works 4 hour shifts one or two days of each month. (E. Boyd, Tr. 123, 135.)

32. Mr. Boyd's pre-1989 broadcast experience is so remote in time as to substantially diminish its credit.[9] However, it will be noted. From 1956 to 1959, he worked summers for Station WCMC in Wildwood, New Jersey. (CBC Exh. 1 at 2-3.) He became an announcer at WCMC and was so employed there in 1960-61. (*Id.* and E. Boyd, Tr. 133.) Between 1956 and 1961, he worked part- time at Station WLDB, Atlantic City, New Jersey; at Station WTUX, Wilmington, Delaware; at Station WEEZ, Chester, Pennsylvania; at Station WXUR, Media, Pennsylvania; and at Station WRBS, Baltimore, Maryland. (CBC Exh. 1 at 3.) And during 1961, Mr. Boyd was an announcer for Station WJBR in Wilmington, Delaware. (E. Boyd, Tr. 133-34.)

33. From 1962 to 1964, Mr. Boyd was employed as program director, production manager, and sales representative for Station WVCA, Chester, Pennsylvania. After 1964, for a short period of time he was employed in production and sales and as an announcer at Station WTUX. (CBC Exh. 1 at 2; E. Boyd, Tr. 134.) From 1965 to 1967, Mr. Boyd worked full time as production manager and announcer at WDEL-FM in Wilmington, Delaware. In 1967, he returned to WTUX as a part-time production manager and announcer. (CBC Exh. 1 at 2 and E. Boyd, Tr. 125, 127.) In 1968, Mr. Boyd joined WJIC in Salem, NJ, as a part-time announcer where he was employed until 1969. (CBC Exh. 1 at 2.)

Auxiliary Power

34. CBC will install auxiliary power generators both at its studio and at its transmitter site to insure continuing station operation in the event power is lost at either location. (CBC Exh. 3.)

CONCLUSIONS OF LAW

35. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service and an assessment of the evidence must be made under the applicable Commission standards in determin-

ing which applicant meets the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

36. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification; and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-07 (D.C. Cir. 1984). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and management and the enhancement of such integration by local residence, civic activities, broadcast experience and minority and female gender preference.

Comparative Proposals

37. There are no basic qualifying issues added against these applicants. But where substantial questions have been raised about an integration proposal, its *bona fides* will be considered under the standard comparative issue. *See, e.g., N. E. O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986). Also, there is a separate issue of comparative coverage.

Diversification

38. Neither applicant owns an attributable interest in a means of mass media communication. Therefore, there are no diversification merits or demerits to consider.

Comparative Coverage

39. The highest comparative coverage preference generally is awarded to the applicant proposing to provide a first or second service. *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984). But in this case, none of the applicants will provide service to an underserved area. And when areas and populations are well-served, only a slight preference will be awarded to applicants proposing even substantially greater overall coverage. *See Simon Geller*, 90 F.C.C. 2d 268-269, 276 (Comm'n 1982) (slight preference awarded for coverage superiority of four times more area and 315,000 persons). An applicant would receive the lesser qualitative credit of "very slight preference" for a coverage difference of 27%. *See Barton Broadcasting Co.*, 104 F.C.C. 2d 785, 791 (Review Bd 1986). But where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 F.C.C. Rcd 5520, 5521 (Comm'n 1989) (coverage difference of 2% for 36,200 persons).

40. Here, the coverage difference between Haefner and CBC (3,479 persons) is 6.5% in favor of CBC. Therefore, CBC is entitled to no more than a very slight preference. *See Family Broadcasting Group*, 93 F.C.C. 2d 771, 779 (Review Bd 1983) (very slight preference awarded for 8% difference).

Best Practicable Service To The Public

41. Ms. Haefner has shown by a preponderance of the evidence that she will integrate full time into the business and operations of the station. Therefore, she is entitled to a full 100% integration credit.

42. CBC, however, is not entitled to any integration credit for Betty Boyd because the preponderance of the evidence shows that she will perform exclusively clerical functions. These functions, while important to the operation of a station, are not recognized for any managerial integration credit. *See Makai Broadcasting, Inc.*, 102 F.C.C. 2d 322, 324 (Review Bd 1985). Therefore, the proposal for Mrs. Boyd's integration is insufficient as a matter of law because there has been no showing by substantial evidence that she will carry out any meaningful "management and policy functions." *Ft. Collins Telecasters*, 103 F.C.C. 2d 978, 988 (Review Bd 1986).

43. Mr. Boyd is presently engaged in the property rental business involving ten rental units. Mrs. Boyd is co-owner of the properties with Mr. Boyd and she also assists in that business. The evidence offered by CBC does not show there to be a plan in place for extricating the Boyds from that business so that they can devote a substantial amount of their time (40 hours per week at a minimum) to the management and operation of the station.

44. At one point in his testimony, Mr. Boyd seeks to convince the finder of fact that his rental properties are "investments, not a business." (E. Boyd, Tr. 86, 112.) That totally unsupported conclusion even is urged in CBC's reply findings. (*See* CBC's RPFC at 7.) Yet, to the contrary, Mr. Boyd has testified to his tasks and duties with respect to those properties: handling lease arrangements, bookkeeping, billings and rent collection, and maintenance. (E. Boyd, Tr. 112-114.) CBC cites these tasks in reply findings and urges that there be a finding that given these facts the Boyds 100% integration proposals will be effectuated. (*See* CBC's RPFC at 7-8.) And even accepting the testimony that Boyd's daughter and son-in-law do help some and will continue to help some, as well as the testimony about hiring part-time outside help, this evidence is diametrically inconsistent with the representation that the ten rental properties are merely an "investment."

45. Mr. and Mrs. Boyd own the properties and Mr. Boyd is the sole hands-on manager. He has not turned the properties over to a professional rental agent as would be the case with an "investment." Nor has he offered evidence that he has made such arrangements on the contingency of winning the CP. CBC offers nothing except last-ditch indefinite testimony offered at hearing that suggests selling the properties if their management interferes with the Boyds giving their full time and attention to the station. (E. Boyd, Tr. 154.)

46. Such evidence does not give the Commission any, let alone sufficient, assurance. For it has been held:

> The Board's routine practice is to find that generalized promises to "diminish" the time spent on a significant business interest is insufficient. [Citations omitted.] In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough: we have no way to check afterwards, and were we to accept such promise where significant business interests remain, all comers would receive full-time credit.

Naguabo Broadcasting Company, 6 F.C.C. Rcd 912, 924 n. 63 (Rev. Bd. 1991), *aff'd*, 6 F.C.C. Rcd _____, Comm'n *Slip Op.* FCC 91-258, released August 15, 1991. The need for proof beyond promises and projections was emphasized in a later case wherein the Review Board held:

> - - - integration credit has been denied to applicants with significant interests because, quite obviously, "the very existence of [any] other interests renders questionable [the integration] commitments in the absence of an additional showing by the applicant of the reliability of its integration proposal . . . ." *Blancett Broadcasting Co.*, 17 F.C.C. 2d 227, 230 (Rev. Bd 1969) (emphasis added). [Subsequent citations omitted.]

Pleasure Island Broadcasting, Inc., 6 F.C.C. Rcd 4261, 4165 (Review Bd 1991). The Review Board has recently applied these authorities in denying an applicant any integration credit where the applicant had

> - - - made no weighty showing at all, let alone a persuasive one, as to how he will spend 50-60 hours per week managing a fledgling station in Orange Beach, while devoting (he says "only") 15 hours a week to another significant business concern - - -.

Id.

47. In the final analysis, the Commission has held that "[a]pplicants have the burden of proof to establish how they will effectuate their integration proposals." *Cuban - American Limited*, 5 F.C.C. Rcd 3781, 3785 (1990); *Julia S. Zozaya*, 5 F.C.C. Rcd 6607 (1990) (applicant retaining business interest denied integration credit). *See also Berryville Broadcasting Co.*, 70 F.C.C. 2d 1, 11-12 (Review Bd 1978). In this case, CBC has offered no "demonstrative evidence" or "convincing plan" and has made no "weighty showing" to overcome the presumption that the retention of ten active rental properties will interfere with the 40 plus hours work week that the Boyds propose to spend managing and operating the station. *See Blancett Broadcasting, supra* and *Pleasure Island Broadcasting, supra*. *See also Naguabo Broadcasting Company*, 6 F.C.C. Rcd _____, Comm'n *Slip Op.* FCC 91-258, *supra* (need for detailed accounting noted where other business interests readily lend to freely dividing time between a local business and the station business). In this case, where Mr. Boyd expects to be out and around soliciting advertising, this stricture of the Commission in *Naguabo* is particularly applicable. Therefore, CBC receives little or no credit for its integration proposal.

Contingent Comparison

48. If CBC were later found to have shown entitlement to 100% integration, Ms. Haefner's substantial credit for local residence and related civic activities would prevail over the very slight credit awarded to CBC for Mr. Boyd's broadcast experience and the very slight credit awarded to CBC for superior coverage.

49. Ms. Haefner was born and raised in Cape May County where she resided until 1964. Such remote childhood local residence receives only a diminished credit. *Colonial Communications, Inc.*, 6 F.C.C. Rcd at 2297, Para. 10. But Ms. Haefner has resided continuously in her service area in a community that is twelve miles from North Cape May since 1980. In contrast, CBC's distractive efforts to convince that the Boyds have resided full-time in North Wildwood is rejected. The Boyds spent recreational and leisure time there in Mr. Boyd's parents' home for which they could receive only a diminished credit as compared with Ms. Haefner's substantial credit. *Cf. Colonial Communications, Inc.*, 6 F.C.C. Rcd at 2297 and *Linda Cook*, 3 F.C.C. Rcd 1867 (Review Bd 1988) (claim for summer months/half year residence will not compare with continuous residence).

50. Since Ms. Haefner is the clear winner on local residence and CBC receives only negligible local residence credit, the related local civic activities credit also is won by Ms. Haefner. *See Ronald Sorenson*, 6 F.C.C. Rcd 1952, 1953 (Comm'n 1991) (residence and civic activities are considered by Commission to be a single local residence factor). Ms. Haefner's eight year commitment to fund raising for the Burdette Tomlin Memorial Hospital ties in with her eleven years of continued residency and it shows her superior likelihood of achieving knowledge of and interest in the community. Her more recent membership in the Middle Township Chamber of Commerce is close to the filing of her application and there has been no specific showing that those activities do not receive a lesser credit as post-application civic activities. *See MTF Enterprises*, 99 F.C.C. 2d 297, 300 (Review Bd 1984). However, such local involvement in the post application period adds to her universe of local knowledge and interest[10] and offsets the post-application civic activities claimed by CBC through the Boyds. *See* Para. 28 *supra* (United Way, New Jersey Cape Health Services, Chamber of Commerce, Art League, Mammal Stranding Committee, Tourism Counsel).

51. Both Ms. Haefner and Mrs. Boyd qualify for the female preference. But Mrs. Boyd has been found to not be involved in management and since she would not qualify for integration credit she would not receive a female qualitative preference. *WHW Enterprises, Inc.*, 89 F.C.C. 2d 799, 819 (Review Bd 1982). If, alternatively, Mrs. Boyd is later held to qualify for full integration, her female preference would cancel Ms. Haefner's preference.[11] But Ms. Haefner's local residence credit would prevail over the very slight comparative coverage credit and the very slight broadcast experience credit. *See Rebecca L. Boedker*, 6 F.C.C. Rcd 2557, 2559-89 (Comm'n 1991) (*Policy Statement* considers local residence to be an enhancement factor of "primary importance" and female ownership plus broadcast experience will not outweigh a substantial enhancement for local residence and civic participation). Even the addition of a very slight credit for CBC's better coverage would not off-set the substantial preference for Haefner's local residence. CBC's coverage shows that its signal will reach a population that is only 6.5% greater than Haefner's. The Commission has held that a percentage difference of 22% had a bearing on the public interest." *Beach Broadcasting Ltd. P'ship*, 6 F.C.C. Rcd _____, *Slip Op.* FCC 91-223, released July 25, 1991. But population coverages of lesser percentages (*e.g.* 2% and 5%) were held to be not dispositive. *Id.* So too here would CBC's 6.5% be viewed as a non-dispositive credit. Both Haefner and CBC propose auxiliary power. Therefore, neither applicant receives a preference over the other in that category. Thus, under an alternative analysis for the contingency of awarding full credit to CBC's integration proposal, Ms. Haefner remains the winner on a straight qualitative comparison.

Summary Conclusions

52. Ms. Haefner is the conclusive winner for her 100% integration proposal as against CBC because CBC receives little or no integration credit. CBC's loss of integration credit is due to the Boyd's collective failure to prove that they will be willing and able to leave their jointly owned and ongoing rental property business in order to alot their full-time to the station; and because Betty Boyd has failed to prove that her work at the station will be other than clerical and secretarial; and because Eugene Boyd will continue to spend substantial time in the day-to-day management of ten jointly owned and presently operating management properities.

53. Alternatively, CBC would receive credit for less than 100% full- time integration due to the acknowledged commitments of Eugene Boyd to the jointly owned rental property business. But as a further alternative, should CBC be later ruled to merit a full integration credit, Jeanne Haefner still would be the comparative winner because of her having a substantial preference for local residence and related civic involvement which qualifies for a credit that is superior to Eugene Boyd's limited broadcast experience and CBC's very slight superior coverage in the fully-served areas.

ORDER

Based on the foregoing, IT IS ORDERED that unless an appeal from this *Decision* is taken by a party, or unless the Commission reviews this *Decision* on its own motion,[12] the application of Cape Broadcasting Corporation (File No. BPH-880728NM) IS DENIED.

IT IS FURTHER ORDERED that the application of Jeanne T. Haefner (File No. BPH-880727MC) for authority to construct a new FM Station on Channel 294A at North Cape May, New Jersey IS GRANTED, subject to the following condition:

> Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation has been demonstrated to the Commission's satisfaction.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] There were initially five party applicants. Elena G. Nacanther and Jeffrey E. Salkin were dismissed after designation for hearing for failing to appear and prosecute. *Order* FCC 90M-3448, released October 31, 1980. Cape Communications Corporation was dimissed in the designation order (DA 90-1023) under the "hard look" doctrine for failing to file a tenderable application.

[2] Haefner Exh. 7 are excepts from the deposition of Betty Boyd taken on January 29, 1991.

[3] In the Integration and Diversification Statement that was exchanged on October 5, 1990, Mr. Boyd was also proposed as General Manager and Program Director. A proposed finding urged by CBC that he also would be credited as the Sales Manager has been rejected by the Judge as an unauthorized up-grade. *See Memorandum Opinion and Order*, FCC 91M-2622 released August 23, 1991.

[4] The Boyds also own a shell company called Laurel Leasing in which five cars are titled including a car that is used by their daughter. Laurel Leasing takes up virtually no time of Mr. and Mrs. Boyd and therefore it is not relevant to the integration issue. (*See* E. Boyd, Tr. 154.)

[5] Based on this testimony CBC seeks a finding that the daughter would manage the rental properties. But the testimony only indicates her "availability" to manage. There is no evidence that she has managed in the past or that she has the experience to manage in the future. The evidence is too tangential to support a finding.

[6] Haefner Exh. 4 is a photocopy of a voting record for Delaware reflecting the names of Mr. and Mrs. Boyd and their signatures. There was no objection raised as to the authenticity or reliability of that evidence.

[7] Because of her admissions that she will only perform clerical duties, there is no consideration given to Mrs. Boyd's claims for civic activities. (*See* CBC's PFC at Para. 15.)

[8] The dates of his employment at WCZN and at WSJL reflect that he sought this experience after CBC had filed its application in this case. In that regard, the testimony of Mr. Boyd establishes that from 1969 to 1989, he was not involved in broadcasting. (CBC Exh. 1 at 2; Boyd, Tr. 130-31.)

[9] As indicated in fn. 8 above, Mr. Boyd had no broadcast experience for the twenty years between 1969 and 1989. In a similar context, the Commission refuses quality credit for long-past local residence. *Cf. Colonial Communications, Inc.*, 6 F.C.C. Rcd 2296 (Comm'n 1991).

[10] Since 1988, Ms. Haefner has been an active member of the Middle Township Chamber of Commerce and she serves on the Chamber's board of directors. She has personally arranged dinners and assisted at antique shows. The Commission has held that the test for weighing civic activities is not whether they are chosen for other than exclusively personal reasons, but whether the activity indicates a knowledge and interest in the community. *Colonial Communications, Inc.* 6 F.C.C. Rcd 2298 n. 7. Certainly, 3 to 4 years' membership with a leadership role in a Chamber of Commerce would result in gaining knowledge and shows an interest in community business.

[11] Or the local residence credit for Haefner would outweigh CBC's female preference. *Horne Industries, Inc.*, 98 F.C.C. 2d 601, 602-03 n. 4 (Comm'n 1984).

[12] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

In re Applications of

ALGREG CELLULAR ENGINEERING *et al.* File No. 10607-CL-P-307-A-89 *et al.*

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1- Franklin

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1991; Released: September 10, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. ZDT Partnership (ZDT) has appealed, pursuant to 47 CFR §1.301(a)(1), the Presiding Officer's *Memorandum Opinion and Order*, FCC 91M-2203, released July 18, 1991, which denied ZDT's petition to intervene in the captioned proceeding. In Comments filed July 31, 1991, the Common Carrier Bureau supported ZDT's appeal. Several other parties either fully or partially opposed the appeal on August 1, 1991. The Board has determined that ZDT is entitled to intervene as a matter of right in this proceeding for the reasons set out below.

2. *Background*: Seventeen pending cellular applications which had been selected lottery winners were designated for hearing pursuant to 47 U.S.C. § 309(e) because their "Mutual Contingent Risk Sharing Agreement" was held to violate a number of Commission Rules. *Memorandum Opinion and Order*, 6 FCC Rcd 2921, 2428 (1991)(as corrected by *Erratum*, 6 FCC Rcd 3547 (1991)). Nine other lottery winners, who had already received authorizations to construct and operate cellular systems, were consolidated for hearing with the seventeen applications, and were ordered to show cause, pursuant to 47 U.S.C. §312, why their authorizations should not be revoked. 6 FCC Rcd at 2927. Seven other entities and the Common Carrier Bureau were made parties to the hearing, but ZDT was not so named. Bureau Comments, p. 2.

3. On July 1, 1991, ZDT timely filed a petition to intervene, pursuant to 47 CFR §1.223(a), following the June 21, 1991 publication of the hearing issues in the Federal Register, 56 Fed. Reg. 28559 (1991). In denying intervention, the presiding Administrative Law Judge (ALJ) first reasoned that ZDT was not entitled to intervene as a matter of right because:

> The mere fact that an entity fills out enough information to become eligible for the distribution of a license by chance does not, standing alone, make that entity a party-in-interest. As A-1 Cellular put it: "If that is all it takes to be a party-in-interest . . . then literally hundreds of other parties also have the 'right' to intervene.

FCC 91M-2203, *supra*, at para. 2. He further held that ZDT was not entitled to intervene as a matter of discretion, pursuant to 47 CFR §1.223(b), because ZDT (1) had not shown how its participation would assist the Commission in the resolution of the issues in question; (2) had not participated in the earlier Commission year-and-a-half investigation; and (3) had not shown that its participation would differ from numerous other lottery losers, who had been named as full parties to the hearing. *Id.*, paras. 3-5.

4. On appeal, ZDT, supported by its counsel's affidavit, urges that:

> ZDT is a party-in-interest in the eleven markets in which it has pending applications merely by virtue of the pendency of its applications. If the Commission determines that the applicants in these markets are not qualified to be Commission licensees, the Commission will conduct another lottery from the original pool of applicants, ZDT being a part of that pool. *See* Conference Report, H.R. Conf. Rep. No. 765, 97th Congress 2d Sess. 39 (1982), U.S. Code Cong. & Admin. News 1982, p 2283 ("to preserve the incentives of the other applicants to raise questions concerning their competitor's qualifications, if the initial 'winner' is determined to be unqualified, the subsequent lottery must be conducted with the same applicant pool.") If, on the other hand, the Commission finds that the applicants designated for hearing are qualified, then ZDT's applications for those markets will be dismissed, causing an economic injury to ZDT. Accordingly, for those markets in which ZDT has a pending application, ZDT is a party-in-interest.

Appeal, pp. 2-3.

DISCUSSION

5. We agree with the Bureau that the question presented by this appeal is whether ZDT "must be allowed to intervene as a matter of right" pursuant to Section 309(e) of the Communications Act and Section 1.223(a) of the Commission's rules. 47 U.S.C. §309(e) provides in pertinent part:

> When the Commission has . . . designated an application for hearing, the parties-in-interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.

Further, 47 CFR §1.223(a) provides that:

> (a) Where, in cases involving applications for construction permit and station licenses, or modifications or renewals thereof, the Commission has failed

> to notify and name as a party to the hearing any person who qualifies as a party-in-interest, such person may acquire the status of party by filing, under oath and not more than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest . . . . Where the person's status as a party-in-interest is established, the petition to intervene will be granted.

6. Here ZDT's petition to intervene was timely subsequent to publication of the issues in the Federal Register. 47 U.S.C. §309(e) was amended in 1964 "to establish a date certain for intervention." Senate Report No. 499, 88 Cong. 1st Sess., p. 2. Congress provided that "thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register" is "the time within which parties-in-interest can intervene as a matter of right." *WFTL Broadcasting Co. v. FCC*, 376 F.2d 782, 784 (D.C. Cir. 1967)(quoting legislative history). Thus, ZDT's opponents' reliance on *Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967), to establish that ZDT's intervention request was late, is misplaced. There intervention was sought near the conclusion of the proceeding and some 15 months after Federal Register publication of the hearing issues. *See also Raveesh K. Kumra*, FCC 91R-71, released August 16, 1991.

7. On the merits of the appeal, the Bureau urges that ZDT "as a mutually exclusive applicant, has standing to intervene as a party-in-interest." Comments, p. 3. Solid legal authority supports the Bureau's position. Recently, in *Palmetto Communications Company*, FCC 91R-75, released August 23, 1991, we cited *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 358 (D.C. Cir. 1949), where the Court had indicated that: "It is only common sense to assume that adversaries with substantial interests at stake will overlook no advantage to be found in an opponent's weaknesses." In *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-77 (1940), the Supreme Court had earlier held that "one likely to be financially injured by the issue of a license" was a party-in-interest with standing to appeal an FCC licensing proceeding.

8. After these Court decisions, Congress in 1952 specifically provided in 47 U.S.C. §309(b), 66 Stat. 715, that parties-in-interest had an absolute right to intervene in licensing proceedings without showing that they could assist in the resolution of the issues. *American Communications Ass'n v. United States*, 298 F.2d 648, 651 n. 5. (2d Cir. 1962). *See also Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811, 816 (D.C. Cir. 1956) (Commission may not deny intervention merely because it thinks intervenor's participation would not aid its decisional process). Moreover, as ZDT points out, Congress in adding the lottery provisions to Section 309 in 1982 sought "to preserve the incentive of other applicants to raise questions concerning [the lottery winner's] qualifications." *See* para. 4, *supra*. Finally, in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987), the Commission indicated that other competing applicants were parties-in-interest on the question of whether the lottery winner was fully qualified. We therefore conclude that to the extent ZDT has pending eleven mutually exclusive applications, it is a party-in-interest entitled to intervene pursuant to 47 U.S.C §309(e), and 47 CFR §1.223(a).

9. A partial opposition to ZDT's appeal by Cellular Pacific *et al.*, correctly points out that FCC revocation proceedings governed by 47 U.S.C. §312, and 47 CFR §1.91 do not provide for intervention as matter of right. These are prosecutory-type hearings, with the burden of proof upon the Commission's Bureau. Thus, Cellular Pacific notes that the Commission has held:

> It would seem reasonable, particularly in a prosecutory-type proceeding where the agency has the burden of proof, to require a substantial showing of special circumstances in order to justify intervention by parties who are otherwise strangers to the proceeding. Such showing would require that the intervenors raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and the issues be of sufficient import and immediacy to justify granting the petitioner the status of a party. *Victor Muscat, et al.*, 31 FCC 2d 620, 621 (1971).

Cellular Partial Opposition at 4. Since ZDT did not even attempt to make the special showing which would justify discretionary intervention under 47 CFR §1.223(b), we affirm the ALJ's denial of leave to intervene in the revocation proceedings.

10. ACCORDINGLY, IT IS ORDERED THAT the Appeal of Denial of Petition to Intervene filed July 23, 1991, by ZDT Partnership IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of:

WILLIAM F. PEEL, JR.	File No. BPH-890906MM
MINORITY BROADCASTING GROUP LIMITED	File No. BPH-890914MT
KAREN M. LOWERY	File No. BPH-890914MU
SEA OAKS BROADCASTING	File No. BPH-890914ND
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-890914NF
COASTAL BROADCASTING CORPORATION	File No. BPH-890914NH
WHITE CITY BROADCASTING, INC.	File No. BPH-890914NP
Q PRIME INC.	File No. BPH-890914NV
HEATHER WILLSON CASS	File No. BPH-890914NW
MIDWAY BROADCASTING COMPANY	File No. BPH-890914OD

For Construction Permit for
New FM Station, Channel 284A,
White City, Florida

MEMORANDUM OPINION AND ORDER

Adopted: September 3, 1991; Released: September 10, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Review Board has under consideration an appeal filed by Karen M. Lowery d/b/a White City Radio (Lowery),[1] pursuant to 47 CFR § 1.301(a)(2), on July 24, 1991. The appeal is unopposed. Lowery is one of several applicants seeking to establish a new FM station on Channel 284A in White City, Florida, and is currently involved in discovery proceedings prior to a comparative hearing. Lowery here appeals the *Memorandum Opinion and Order*, FCC 91M-2213, released July 18, 1991 (*MO&O*) of Administrative Law Judge Walter C. Miller (ALJ), requiring the production of certain documents over Lowery's claims of attorney-client privilege and work-product doctrine protection.

BACKGROUND

2. The ALJ's *Prehearing Order*, FCC 91M-1639, released May 16, 1991 (*Prehearing Order*), among other things, stated that there would be "automatic" document production and appended a list of categories of documents that each applicant was required to produce. The ALJ also stated (at para. 14, footnote omitted):

> If any applicant intends to claim an attorney-client privilege or attorney work-product doctrine, they must file their motion for an *in camera* inspection on June 13, 1991. There they must follow the five-step procedure outlined in *Patterson Communications Associates*, 41 RR 2d 640 (1977) and 41 RR 2d 1027 (1977).

3. Lowery filed a "Request for *In Camera* Inspection of Privileged Documents" on June 10, 1991, in response to the ALJ's *Prehearing Order*. In her request, Lowery stated that certain documents, fifteen in all, were being withheld from production based on the attorney-client privilege and work-product doctrine protection. Lowery appended the subject documents to her pleading, seeking *in camera* inspection and a protective order shielding the documents from discovery. Lowery's request was opposed by Crystal Communications, Inc. which argued that: "Despite Commission precedent and the Presiding Judge's explicit instructions, Lowery failed to support her claims with the specificity required to evidence a valid privilege." Crystal Opposition at para. 3.

4. The ALJ agreed with Crystal, denied Lowery's request, and ordered the production of the fifteen documents *in toto* because "Lowery has failed to ' . . . follow the five-step procedure outlined in *Patterson Communications Associates*, 41 RR 2d 640 (1977) and 41 RR 2d 1072 (1977).'" *MO&O* at para. 3. More specifically, according to the ALJ, "Lowery has failed to show how the privilege or work-product doctrine applies to *each* of the 15 listed documents, and has failed to indicate which legal concept; *i.e.*, the attorney-client privilege or the work-product doctrine it is invoking on each document." *Id.* at para. 4. Although the ALJ had the documents in question in his possession, *id.* at n. 2, he did not inspect them, having found the claims of protection deficient on their face.

5. In her instant appeal, Lowery waives her claim of privilege as to seven documents (Document Nos. 1, 4, 5, 8, 9, 10, and 13), and the first three paragraphs in an eighth document (Document No. 11), but reiterates her privilege claim as to the remaining seven documents (Document Nos. 2, 3, 6, 7, 12, 14, and 15) and paragraph 4 of Document No. 11. In support, Lowery argues that her initial request: (1) claimed attorney-client privilege and work product doctrine protection; (2) invoked the attorney-client privilege with Lowery's personal statement; (3) described "the gist of each privileged document . . . in sufficient detail to enable any party to challenge any particular claim;" (4) argued that counsel has filed similar requests for *in camera* inspection and for protective orders in other proceedings before the same ALJ, who has approved and granted the requests at least in part, raising no objection to their sufficiency; and alleged that (5) the

procedure outlined in *Patterson Communications Associates*, *supra*, required here by the ALJ, has never been adopted by the Commission. Nevertheless, "out of an abundance of caution," Lowery outlined more specifically the bases for her claims and amended the description of the documents for which protection is sought in her appeal. Lowery has also furnished the Board with copies of the documents for which she continues to seek protection.

DISCUSSION

6. The Board has been requested to rule on privilege claims where the documents in question have not, in the first instance, been examined by the presiding ALJ, despite the procedures outlined in his *Prehearing Order* to facilitate the presentation and consideration of valid privilege claims. However, as the Board declared in *LNJ Communications*, 3 FCC Rcd 4411 (Rev. Bd. 1988):

> [W]e are persuaded that it would have been more conducive to the orderly and efficient dispatch of the Commission's business for *in camera* examinations of purportedly privileged documents *to be made, in the first instance, by the presiding ALJ.*

Nevertheless, Lowery has now reduced and refined her claims on appeal and submitted the documents directly to the Board. Thus, remanding the matter to the ALJ in the present posture would serve "no useful purpose," *see WWOR-TV, Inc.*, 5 FCC Rcd 6261, 6264 n. 4 (1990); *Georgia Public Telecommunications Commission*, 5 FCC Rcd 4560, 4561 n. 2 (1990), and we will review the privilege and work-product claims and the documents.[2]

7. The Commission and the Board have had numerous opportunities recently to clarify the general principles governing claims of attorney-client privilege and work-product doctrine protection. *See, e.g., WWOR-TV, Inc., supra*; *Georgia Public Telecommunications Commission, supra*; *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 3599 (Rev. Bd. 1991); *Raveesh K. Kumra*, 5 FCC Rcd 5607 (Rev. Bd. 1990). More specifically, the Commission in *WWOR-TV, Inc.*, 5 FCC Rcd at 6262, outlined the distinctions between the two legal concepts as follows (citations omitted):

> The purpose of the attorney-client privilege is to protect confidential communications by a client to his or her lawyer for the purpose of obtaining legal advice. The key elements of the attorney-client privilege are: (1) the existence of an attorney-client relationship; (2) a communication from the client to his or her attorney; (3) the communication is legally related; and, (4) there is an expectation of confidentiality. The privilege also extends to communications from the attorney to the client, at least to the extent that such communications might tend to reveal confidential facts disclosed by the client.
>
> The work product doctrine involves a different analysis. As relevant to this proceeding, it prohibits the discovery of documents prepared in anticipation of litigation or for trial by or for another party or that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). Nonetheless, the party seeking discovery may obtain the documents upon a showing that it has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Even when a proper showing has been made, the presiding officer should protect against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

8. Applying these principles to the documents for which protection is sought here, it is useful to divide the documents (letters) into two groups: (1) letters from the client (Karen Lowery) to her attorney (Jerrold Miller, Esq.); and (2) letters from the attorneys (Samuel Miller, Esq.; Jerrold Miller, Esq.; John S. Neely, Esq.) to the client (Karen Lowery). In the first group (letters from client to attorney) there are three letters (Document Nos. 2, 3, 6) for which attorney-client privilege has been claimed. We believe that the four key elements of attorney-client privilege enumerated in *WWOR-TV, Inc., supra*, are present; *i.e.*, there appears to be an attorney-client relationship between Ms. Lowery and Mr. Miller, the letters are from Ms. Lowery to Mr. Miller, the letters are unquestionably legally related, and there is an expectation of confidentiality. Thus, this correspondence is privileged.

9. In the second group (letters from the attorneys to the client) there are five letters (Document Nos. 7, 12, 14, 15, and paragraph 4 of Document No. 11), for which attorney-client privilege and work product doctrine protection have been claimed. Document No. 7 provides counsel's comparative analysis of the competing White City applicants; Document No. 12 provides further analysis of counsel of the competing applicants; Document No. 14 outlines the client's financial obligation to counsel, FCC filing fees, and one matter related to the client's application; Document No. 15 discusses the ALJ's *Prehearing Order* and the client's obligations thereunder and pursuant to Commission Rules; and paragraph 4 of Document No. 11 requests information from the client regarding the preparation of the application.

10. The Board holds that these letters are protected to varying degrees by the work-product doctrine. "In a work-product discovery analysis, the date on which litigation 'could reasonably have been anticipated' has major importance . . . ." *Opal Chadwell*, 103 FCC 2d 840 (Rev. Bd. 1986). Here, Lowery filed her application for a construction permit for a new FM station on Channel 284A on September 14, 1989. The documents in question span a period from September 1990 to May 1991 and discuss the prosecution of the Lowery application. The Board concludes that Document Nos. 7, 12, and 15 "were prepared in anticipation of litigation" and are protected *in toto* by the work product doctrine. *See Opal Chadwell*, at 846. As to Document No. 11, Lowery claims protection for paragraph 4, and the Board concurs because this paragraph contains legal advice to the client in preparation of her litigation. Lowery also claims protection for Document No. 14 *in toto*; however, the Board finds that such protection exists only for paragraph 3, which pertains to a portion of the client's application and contains legal advice regarding the same. The remainder of the letter deals with financial arrangements between the attorney and client and, thus, should be disclosed. *See Western Cities Broadcasting, Inc.*, 6 FCC Rcd at 3599 (letter from client

to attorney discussing some of financial "arrangements by which the client retained the attorney" ordered disclosed), *citing WWOR-TV, Inc.*, 5 FCC Rcd at 6263 ("Even though such documents often entail an element of counsel's strategy, the Courts have regularly denied documents protection that discuss terms and conditions of employment or the employment purpose.").

11. Thus, Lowery shall make available for discovery those documents for which she has waived her claim of privilege (Document Nos. 1, 4, 5, 8, 9, 10, and 13), all of Document No. 11 (*except for* paragraph 4), and Document No. 14 (*except for* paragraph 3). The remaining documents for which Lowery claims privilege (Document Nos. 2, 5, 6, 7, 12, 15) are not discoverable.

12. ACCORDINGLY, IT IS ORDERED, That the Appeal of Lowery Broadcasting Limited Partnership IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Karen M. Lowery apparently filed a post-designation amendment and petition for leave to amend on July 12, 1991 in which she asked the ALJ to accept "an unexecuted limited partnership agreement . . . ." *See Memorandum Opinion and Order*, FCC 91M-2585, released August 20, 1991. The ALJ there denied the petition and the accompanying amendment, and accordingly denied her "permission to represent that the applicant for BPH-890914MU is 'Lowery Broadcasting Limited Partnership.'" *Id.*

[2] More recently, in *Western Cities Broadcasting, Inc.*, 6 FCC Rcd 3599 (Rev. Bd. 1991), the Board admonished an applicant that "blunderbus invocation of that [attorney-client] privilege is not favored by the law." The Board anticipates that parties will craft their privilege claims carefully and with particular specificity before the presiding officer. If parties fail to do so, the presiding officer may reject the privilege claims. *See Warren Price Communications, Inc.*, 4 FCC Rcd 1992, 1993 (1989) (Commission "give[s] ALJs wide latitude to regulate the course of hearing proceedings so long as they do not act in an arbitrary or capricious manner"); *Metroplex Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987) ("Presiding Officer has broad authority to regulate the course of the hearing, particularly with respect to discovery and evidentiary matters.")

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3175

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: August 30, 1991; Released: September 4, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. AT&T filed Transmittal No. 3175 to revise its Tariff F.C.C. No. 2 to change or delete provisions in its Location Specific Term Plans (LSTPs) and Customer Specific Term Plans (CSTPs) that now permit customers to cancel their plans without liability if they move their traffic to another AT&T term plan of equal or greater value. On June 24, 1991, Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 3175. AT&T filed its reply on July 3. Transmittal 3175 is scheduled to become effective September 5, 1991.

2. AT&T's LSTPs and CSTPs provide discounts to customers who subscribe to AT&T 800 Service for a three-year service term. Customers of these plans who cancel service before the term ends must pay termination liability charges. AT&T currently exempts customers from payment of those charges, however, if they order a new term plan or merge their plan with another existing plan having equal or greater monthly revenue commitments. Discontinuance of the former term plan and inception of the new or merged term plan must be done concurrently.

3. Under Transmittal 3175, AT&T would retain the existing termination liability provisions for both LSTP and CSTP customers whose term plans were effective before September 5, 1991.[1] However, an LSTP customer ordering a new term plan or renewing an existing term plan after that date would be excused from termination liability only if the same customer initiated the existing LSTP and the LSTP to which it is moving its 800 Service traffic. In addition, under Transmittal 3175, the new LSTP must havea revenue commitment equal to or greater than the sum of the revenue commitments in the original plans.[2] No similar new provision is provided for customers of CSTPs; these customers who merge plans will be liable for termination charges.

4. Ad Hoc argues that the Transmittal 3175 provisions are inconsistent with the *RCA Americom Decisions* and previous Bureau holdings.[3] Ad Hoc notes that AT&T's existing tariff provisions allow a customer to "roll-over" existing LSTPs and CSTPs for additional multi-year terms. According to Ad Hoc, the term "roll-over" strongly suggests that the arrangement will be continued on the same terms and conditions. Thus, says Ad Hoc, AT&T must demonstrate substantial cause for changing the terms of its plans for any existing customers. Ad Hoc contends that AT&T has not demonstrated the persuasive "substantial cause" showing necessary to unilaterally alter existing terms that are implied by the "roll-over" provisions in current long term contracts. Ad Hoc Petition at 3-6. Ad Hoc further argues that the proposed tariff will result in disparate treatment of single customer consolidations. *Id.*

5. AT&T responds that no "roll-over" provisions exist in its tariff, and that the tariff language specifies that the term plan expires at the end of three years. AT&T asserts that no substantial cause showing is required since all customers become new customers upon their affirmative resubscription to a new three-year plan. AT&T Reply at 4-6. AT&T argues that no discrimination exists since the proposed revisions eliminate all multi-customer consolidations, including those of resellers and commercial 800 term plan customers. *Id.*

6. The Common Carrier Bureau has reviewed the AT&T transmittal as revised, Ad Hoc's petition, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff is patently unlawful so as to warrant rejection, and that an investigation is not warranted at this time.

7. Therefore, IT IS ORDERED that the petition to reject or suspend and investigate the AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 3175, filed by the Ad Hoc Telecommunications Users Committee, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

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[1] On August 30, 1991, AT&T was granted Special Permission No. 91-734 to file revisions extending the "grandfather" date from June 7, 1991 to September 5, 1991, the effective date of Transmittal 3175.

[2] AT&T Tariff F.C.C. No. 2, Section 3.3.1.N.3.

[3] Ad Hoc Petition at 2-3, *citing* RCA Americom Communications, Inc., 84 FCC 2d 353 (1980); 86 FCC 2d 1197 (1981); 2 FCC Rcd 2236 (1987); 932 F. 2d 1 (D.C. App. 1991) (*RCA Americom Decisions*), and AT&T Communications, Transmittal Nos. 2404 and 2535, 5 FCC Rcd. 6777 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Pine - Aire
Broadcasting Corporation, Inc.,
Licensee of Station WRLS-FM
Hayward, Wisconsin

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1991; Released: September 10, 1991

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a Notice of Apparent Liability (NAL) issued on June 24, 1988, for two thousand dollars ($2,000) against Pine-Aire Broadcasting Corporation, Inc., ("Pine Aire"), licensee of Station WRLS-FM, Hayward, Wisconsin. To date, Pine-Aire has not submitted a response to the NAL and has not paid the forfeiture. Therefore, the facts as set forth in the NAL are uncontested and we affirm the forfeiture for two thousand dollars ($2,000) pursuant to Section 503(b).

2. On September 9, 1987, at approximately 10:14 a.m., WRLS-FM broadcast an advertisement for a bingo game sponsored by the Lac Courte Oreille (Indian) Tribal Government. At that time, Section 73.1211 of the Commission's Rules proscribed the broadcast of advertisements of, or information concerning all lotteries except those conducted by a State acting under authority of State law. A lottery is a scheme involving the elements of prize, chance, and consideration. *FCC v. American Broadcasting Company, Inc.*, 347 U.S. 284 (1954). Because it contained the three elements as described above and did not fall within the exception to the rule as it was not a state conducted lottery, the advertised bingo game was a lottery. The NAL issued by the Bureau assessed a $2,000 forfeiture against Pine-Aire for a violation of Section 73.1211 of the Commission's Rules.[1] (47 C.F.R. Section 73.1211).

3. Based on the record, we find that Pine-Aire willfully broadcast the subject advertisement in violation of 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules.[2] We have reviewed the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and conclude that the amount of forfeiture assessed against Pine-Aire in this proceeding is justified.

4. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Pine-Aire Broadcasting Corp., Inc., licensee of Radio Station WRLS-FM, Hayward, WI, FORFEIT to the United States two thousand dollars ($2,000) for its violation of Section 73.1211 of the Commission's Rules. Payment of the forfeiture may be made by mailing the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTES

[1] Section 73.1211(a) of the Commission's Rules provides:

> No licensee of an AM, FM, or television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes. (18 U.S.C. 1304, 62 Stat. 763).
>
> The lottery prohibition as it applies to Indian Gaming such as that involved in the instant advertisement was significantly changed in 1988 by the enactment of The Indian Gaming Regulatory Act. 25 U.S.C. 2701 *et seq.* That Act generally permits the broadcast of information concerning, or advertisements for, Indian Gaming conducted in compliance with that Act. *See also* Section 73.1211 (c)(3) of the Commission's Rules.

[2] On April 4, 1988, this licensee was issued a Memorandum Opinion and Order ordering the payment of a forfeiture of Seventy five hundred dollars ($7,500) for the repeated violation of Section 73.1211 based on bingo announcements sponsored by the same Indian Tribe.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Iowa RSA #12 File No. 09359-CL-MP-91
Limited Partnership

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block B,
in Market No. 423, Winneshiek, Iowa
RSA, for station KNKN642

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1991; Released: September 10, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 15, 1991 Iowa RSA #12 Limited Partnership (ILP) filed the captioned application to add a new cell to its existing wireline cellular system in the Winneshiek, Iowa Rural Service Area (RSA). The proposed cell's 39 dBu contour would extend beyond the boundary of the Winneshiek RSA and into the adjacent RSA. Public notice of the ILP's application was given May 3, 1991. *See* Public Notice, Report No. CL-91-140. The application was granted without objection on June 19, 1991. On July 22, 1991, RSA 11 Limited Partnership (RLP), the wireline licensee in the Iowa RSA 11 market, filed a petition for reconsideration pursuant to Section 1.106 of the Commission's rules to which ILP responded.[1] For the reasons discussed below, we dismiss RLP's petition for reconsideration.

II. CONTENTIONS

2. In its petition, RLP argues that ILP has failed to meet the two elements required to justify extension of its 39 dBu contour beyond the boundary of its RSA. First, the extension must be minor in size and scope. Second, RLP contends that the application must contain a specific engineering justification for the extension, no matter how small its size. RLP contends that while the extension into Iowa RSA 11 constitutes a relatively small percentage of the area, it includes a highly-traveled portion of Interstate Highway 380 which is a major artery between Cedar Rapids and Waterloo, Iowa. RLP argues that this route is a significant source of roamer activity, which is a factor in finding that an extension is not *de minimis*.[2] Similarly, RLP maintains that ILP's failure to provide any engineering justification for the extension is contrary to Commission precedent and policy.

3. In its opposition to the petition, ILP points out that its application was granted after the requisite 30 day notice period during which no petitions to deny were filed. Subsequently, the station was constructed and placed into operation. ILP argues that RLP's petition for reconsideration should be dismissed because it has failed to justify its non-participation in the earlier stages of the proceeding. According to ILP, RLP's statement that "inadvertent circumstances" caused its inability to learn of ILP's application does not constitute "good reason" for its failure to file a petition to deny. ILP also challenges the merits of RLP's petition. Where 39 dBu extensions are obviously minor, ILP maintains, the Commission accepts very brief explanations of the type given by ILP in its application. In addition, ILP states that it is ready to cooperate with RLP by means of frequency coordination and/or power reduction if it can be demonstrated that [illegible] is interfering with RLP's service within Iowa RSA #11. However, ILP claims that RLP is not providing 39 dBu coverage in the extension area and, thus, has no right to require any operational changes in ILP's system.

III. DISCUSSION

4. RLP has not satisfied the Commission's requirement that an entity not previously a party show good cause why it was not possible to participate in the earlier stage of the proceeding. RLP's petition is fatally defective and is dismissed for failure to comply with Section 1.106(b) of the rules.

5. Moreover, even if we were to address the merits of the petition, RLP does not raise matters that would warrant grant of reconsideration. Proposed extensions are evaluated on a case-by-case basis. In so doing, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of the adjoining boundaries and any extenuating engineering problems. *See Procedures Update*, 52 Rad. Reg. 2d (P&F) 725 (1982) *aff'd Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984). ILP's 39 dBu contour extension into Iowa RSA #11 is *de minimis* in nature, comprising approximately 4% of the cell's area. ILP has minimized the cell's contour in the direction of Iowa RSA #11 by using a highly directional antenna. The decision cited by RLP, *GTE Mobilnet of Cleveland, Inc., supra*, does not support its argument. There, the Commission determined that the particular shape of the MSA boundaries in the proposed extended service area, in addition to the three Interstate Highways in the same area, precluded allowance of any extension. Here, we do not find the same factors present. That ILP's *de minimis* extension into the adjacent RSA will cover a small portion of a major highway is not, by itself, reason to deny the extension.

6. Based on the foregoing considerations, we affirm grant of ILP's above-captioned application and dismiss the petition for reconsideration filed by RLP.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED THAT the petition for reconsideration filed by RSA 11 Limited Partnership IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone,
Chief, Common Carrier Bureau

FOOTNOTES

[1] According to RLP, it was unable to review the contents of ILP's application until after close of the comment period, "[d]ue to inadvertent circumstances."

[2] In support of its position, RLP cites GTE Mobilnet of Cleveland, 54 Rad. Reg. (P&F) 2d 1410 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

STEELVILLE TELEPHONE EXCHANGE, INC. — File No. 63500-89-15-RPS

Notice of Apparent Liability for Forfeiture for failure to file renewal with respect to Station KNKK380 in the Public Mobile Service at Steelville, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1991; Released: September 10, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Steelville Telephone Exchange, Inc. ("Steelville") has filed a "Request For Remission or Reduction of Forfeiture" of the $3.150 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (*NALF*) dated May 12, 1989. For the reasons stated below, we are rescinding the forfeiture.

II. DISCUSSION

2. On October 1, 1987, the MSD granted authority to Steelville to construct and operate Station KNKK380 on frequency 454.125 MHz. Steelville completed construction on March 9, 1988. Steelville's authorization expired on July 1, 1988, but Steelville did not file a renewal application. On April 11, 1989, Steelville filed a request for Special Temporary Authority to continue to operate Station KNKK380 pending Commission action on an application for reinstatement of expired authorization. On May 12, 1989, the MSD issued the *NALF* because Steelville did not file a renewal application and kept operating Station KNKK380.

3. Steelville states that it is relatively inexperienced, that its construction permit did not specify the license expiration date, and that it was not notified by the Commission that its license would expire only four months after the station was constructed. Steelville further asserts that its violation was neither willful nor intentional and that such oversight was largely due to Steelville's lack of legal representation.

4. Steelville further argues that recission or mitigation is warranted because: (1) its violation did not harm the public interest; (2) the violation was inadvertent; (3) it demonstrated good faith in promptly and voluntarily disclosing the matter; and (4) it has no history of prior Commission rule violations or problems.

5. After a careful review of the record, we find that the forfeiture should be cancelled. In 1983, the Commission extended all existing PLMS license terms an additional five years from the end of the license term specified on outstanding authorizations. *See Common Carrier and Satellite Licensing Procedures Pursuant to the Communications Amendments Act of 1982*, 48 Fed. Reg. 27251 (June 14, 1983) (*Licensing Procedures*). The Commission adopted Section 22.45 of the Commission's rules in *Licensing Procedures*.[1] Although the staff has interpreted Section 22.45 to require that all wireline licenses granted before July 1988 must be renewed by July 1, 1988 (*see Public Notice*, Mimeo No. 2661 (released Apr. 21, 1988), the *Licensing Procedures* order, however, is silent on this subject and was not clear to many licensees.

6. The initial Steelville authorization for Station KNKK380 was issued after the *Licensing Procedures* order was adopted but did not indicate the expiration date of the authorization. In view of the fact that there was no expiration date on the authorization, application of the renewal rule would be unfair. Accordingly, under these circumstances, we do not believe sanctions are appropriate. *See Bart Gonzalez*, 6 FCC Rcd 4646 (Com. Car. Bur. 1991).

III. ORDERING PARAGRAPH

7. Accordingly, IT IS ORDERED that the Request for Remission or Reduction of Forfeiture filed by Steelville Telephone Exchange, Inc. IS GRANTED and that the forfeiture IS RESCINDED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Section 22.45 states in relevant part:

> (a) Licenses will be granted for up to ten years. When a date is specified in paragraph (b), of this section, the license will be valid until that date in the year of expiration. When the Commission determines the public interest, convenience or necessity would be served by a shorter license period, the license will be granted for such period.
>
> (b) *License Termination*. Station licenses will expire on the dates listed below, in the year of expiration:
>
> Public Land Mobile (radio common carriers)--Apr. 1
>
> Public Land Mobile (wireline common carriers)--July 1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-73

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (New Bern and Oriental, North Carolina) RM-7609

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1991; Released: September 11, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Conner Media Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1824 (1991), proposing the substitution of Channel 231C3 for Channel 231A at New Bern, North Carolina, the reallotment of Channel 231C3 from New Bern to Oriental, North Carolina, and the modification of Station WZYH-FM's construction permit to specify Oriental as the community of license. Petitioner filed comments supporting the proposal. No other comments were received.

2. We believe the public interest would be served by substituting Channel 231C3 for Channel 231A, reallotting the channel from New Bern to Oriental, North Carolina, and modifying Station WZYH-FM's construction permit accordingly. We believe that petitioner has shown that the reallotment of Channel 251, as a Class C3, to Oriental will result in a preferential arrangement of allotments. Oriental will receive a first local aural transmission service while New Bern would retain local aural transmission service from two FM and three AM stations. In addition, Station WZYH-FM, operating on Channel 231C3 in lieu of Channel 231A, will be able to expand its coverage area.

3. Channel 231C3 can be allotted to Oriental, North Carolina, in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.2 kilometers (8.2 miles) west to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's construction permit for Station WZYH-FM to specify Channel 231C3 at Oriental, North Carolina.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
New Bern, North Carolina	270C1, 293C1
Oriental, North Carolina	231C3

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Conner Media Corporation for Station WZYH-FM, New Bern, North Carolina, IS MODIFIED to specify operation on Channel 231C3 at Oriental, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Conner Media Corporation, permittee of Station WZYH-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 231C3 at Oriental are North Latitude 35-00-02 and West Longitude 76-49-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-259

In the Matter of

Amendment of Section 73.202(b), RM-7309
Table of Allotments,
FM Broadcast Stations.
(Canovanas, Mayaguez, Quebradillas,
San Juan and Vieques, Puerto Rico)

NOTICE OF PROPOSED RULE MAKING
AND
ORDERS TO SHOW CAUSE

Adopted: August 28, 1991; Released: September 11, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making jointly filed by Carlos J. Colon-Ventura ("Colon-Ventura"), license of Station WSAN, Vieques, Puerto Rico, and Jose J. Arzuaga ("Arzuaga"), licensee of Station WREI, Quebradillas, Puerto Rico ("petitioners"). Colon-Ventura requests the substitution of Channel 252A for Channel 255B at Vieques, the reallotment of Channel 252A from Vieques to Canovanas, Puerto Rico, and the modification of Station WSAN's license accordingly. Arzuaga requests the substitution of Channel 258A for Channel 252A at Quebradillas, Puerto Rico, and the modification of Station WREI's license to specify the alternate Class A frequency. In order to accommodate the allotments at Canovanas and Quebradillas, petitioners also request the substitution of Channel 254B for Channel 256B at Mayaguez, Puerto Rico, licensed to Station WKJB-FM,[1] and the substitution of Channel 256B for Channel 253B at San Juan, Puerto Rico, licensed to Station WPRM-FM. Petitioners state that they will apply for their respective channels, if allotted. They also state their willingness to reimburse the licensees of Stations WKJB-FM and WPRM-FM for the reasonable costs associated with the channel changes.

2. Petitioners state that Vieques, with a 1980 U.S. Census population of 7,662 persons, presently receives local aural transmission service from FM Station WSAN and AM Station WIVV while Canovanas, with a 1980 U.S. Census of 31,880 persons, has no local aural transmission service. Thus, they submit that the adoption of their proposal will result in a preferential arrangement of allotments since it will provide a first local service to the larger community of Canovanas and enable Station WSAN to increase the population it serves.

3. Channel 252A can be allotted to Canovanas in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.8 kilometers (8.6 miles) southeast to accommodate petitioner's desired transmitter site. Channel 258A can be allotted to Quebradillas and can be used at Station WREI's present transmitter site. Channel 254B can be allotted to Mayaguez and can be used at Station WKJB's present transmitter site. Channel 256B can be allotted to San Juan and can be used at Station WPRM's present transmitter site.[2] The allotments of Channel 252A at Canovanas and Channel 255B at Vieques are mutually exclusive since the communities are approximately 52 kilometers apart while the Commission's rules specify a minimum distance separation of 69 kilometers for third adjacent Class A and B allotments. Therefore, we will not accept competing expressions of interest in use of Channel 252A at Canovanas or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Based on the information submitted, we are unable to tentatively conclude that the proposed substitution of Channel 252A for Channel 255B and its reallotment from Vieques to Canovanas would result in a preferential arrangement of radio facilities. We note that Canovanas is within the San Juan Urbanized Area, as defined by the U.S. Census. Thus, we question whether Canovanas is deserving of a first local FM service preference or whether it should be credited with all of the aural services licensed to the Urbanized Area.[3] Petitioners are therefore requested to submit information sufficient to show that Canovanas is deserving of such a preference. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990). We also note that this proposal could result in a significant reduction of areas presently receiving service from Station WSAN. Therefore, petitioners should also submit detailed information concerning areas and populations gained and lost by virtue of the proposed change.

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[1] Petitioners alternatively propose to substitute Channel 253B for Channel 256B at Mayaguez to accommodate the proposal of V. I. Stereo Communications, Incorporated, to reallot Channel 291B from Christiansted, Virgin Islands, to Vieques and the allotment of Channel 254A to Culebra, Puerto Rico, filed in response to the *Notice of Proposed Rule Making* in MM Docket 89-495. *See* 4 FCC Rcd 8115 (1989). However, V. I. Stereo's proposal was not considered in MM Docket 89-495 because it was advanced after the period for filing counterproposals. *See Report and Order* in MM Docket 89-495, adopted August 20, 1991. Therefore, we will not alternatively propose the allotment of Channel 253B to Mayaguez in this proceeding.

[2] The coordinates for Channel 252A at Canovanas are North Latitude 18-18-36 and West Longitude 65-47-41. The coordinates for Channel 258A at Quebradillas are 18-23-33 and 66-59-46. The coordinates for Channel 254B at Mayaguez are 18-09-05 and 66-59-19. The coordinates for Channel 256B at San Juan are 18-06-45 and 66-03-07.

[3] There are currently six FM and twelve AM stations licensed to the community of San Juan.

5. Whenever an existing licensee is ordered to switch frequencies to accommodate a new channel allotment, we require the proponent of the new allotment to make a commitment that it would reimburse the affected station for the costs incurred in changing frequencies. *See Circleville, Ohio*, 8 FCC 2d 159 (1976). Petitioners have acknowledged their responsibility to reimburse Stations WKJB-FM and WPRM-FM for the reasonable costs associated with their frequency change.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Canovanas, Puerto Rico	--	252A
Mayaguez, Puerto Rico	231B, 248B, 256B	231B, 248B, 254B
Quebradillas, Puerto Rico	252A	258A
San Juan, Puerto Rico	229B, 253B, 260B, 273B, 284B, 289B	229B, 256B, 260B, 273B, 284B, 289B
Vieques, Puerto Rico	255B	--

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Radio Station WKJB AM-FM, Inc. ("WKJB"), licensee of Station WKJB, Channel 256B, Mayaguez, Puerto Rico, and Arso Radio Corp. ("Arso"), licensee of Station WPRM-FM, Channel 253B, San Juan, Puerto Rico, SHALL SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channel 254B and 256B, respectively, as proposed herein instead of the present Channels 256B and 253B, respectively.

8. Pursuant to Section 1.87 of the Commission's Rules, WKJB and/or Arso may, not later than **November 4, 1991,** file a written statement showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on WKJB and/or Arso to furnish additional information. If WKJB and/or Arso raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, WKJB and/or Arso will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensees of Stations WKJB-FM and WPRM-FM, as follows:

Arso Radio Corp.
c/o John P. Bankson, Jr.
Hopkins & Sutter
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(Counsel to Arso Radio)

Radio Station WKJB AM-FM, Inc.
P.O. Box 1293
Mayaguez, Puerto Rico 00708

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Oyster,
Esq.
Route 1, Box 203A
Castleton, Virginia 22716
(Counsel to Arzuaga)

Frank R. Jazzo,
Esq.
Fletcher, Heald & Hildreth
1225 Connecticut
Avenue, N.W., Suite 400
Washington, D.C. 20036-2679
(Counsel to Colon-Ventura)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-260

In the Matter of

Amendment of Section 73.606(b), RM-7788
Table of Allotments,
TV Broadcast Stations.
(Eureka Springs, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 28, 1991; Released: September 11, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of New Life Evangelistic Center, Inc. ("petitioner"), seeking the allotment of UHF Channel 34 to Eureka, Arkansas, as that community's first local television broadcast service. Petitioner stated its intention to apply for authority to construct and operate a television broadcast station on Channel 34, if allotted.

2. Eureka Springs (population 1,989),[1] in Carroll County (population 18,203), is located approximately 225 kilometers (140 miles) northwest of Little Rock.

3. A staff engineering review has determined that Channel 34 can be allotted to Eureka Springs consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[2] However, the proposed allotment of Channel 34 to Eureka will require a plus offset.[3] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Eureka Springs is not affected thereby.[4]

4. We believe the public interest would be served by proposing the allotment of UHF Channel 34 to Eureka Springs as that community's first local television broadcast service. Accordingly, we week comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Eureka Springs, Arkansas	--	34+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John H. Midlen, Jr., Esq.
Gregory H. Guillot, Esq.
Midlen & Guillot, Chartered
3238 Prospect Street, N.W.
Washington, D.C. 20007-3214

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] Population figures were taken from the 1980 U.S. Census.
[2] Coordinates used for Channel 34 at Eureka Springs are 36-24-12 and 93-44-12.
[3] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, WI*, 3 FCC Rcd 6765 n. 1 (1988).
[4] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-262

In the Matter of

Amendment of Section 73.202(b), RM-7792
Table of Allotments,
FM Broadcast Stations.
(Walterboro, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 30, 1991; Released: September 11, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gresham Communication, Inc. ("petitioner"), requesting the substitution of Channel 265C3 for Channel 265A at Walterboro, South Carolina, and the modification of Station WALD-FM's license to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 265C3 for Channel 265A at Walterboro since it could provide the community with a wide coverage area FM service and enable Station WALD-FM to expand its service area. Channel 265C3 can be allotted to Walterboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.7 kilometers (12.2 miles) northeast to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's license for Station WALD-FM to specify operation on Channel 265C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Walterboro or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Walterboro, South Carolina	265A, 287A	229A or 249A,[2] 265C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
2033 M Street, N.W., Suite 207
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 265C3 at Walterboro are North Latitude 32-59-00 and West Longitude 80-28-00.

[2] The Commission has proposed to substitute either Channel 229A or Channel 249A for Channel 287A at Walterboro in a separate proceeding, at the request of Cedar Carolina Limited Partnership and Eutaw Broadcast Associates. *See* 6 FCC Rcd 2243 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-113

In the Matter of

Amendment of Section 73.606(b), RM-7643
Table of Allotments,
TV Broadcast Stations.
(Los Angeles and Norwalk,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 29, 1991; Released: September 11, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 2136 (1991), issued in response to a petition filed on behalf of Fidelity Television, Inc. ("petitioner"), licensee of Station KCAL-TV, Channel 9, Norwalk, California, proposing to amend the TV Table of Allotments by changing its community of license from Norwalk to Los Angeles, California, and modifying its license accordingly.[1] Petitioner filed supporting comments in response to the *Notice*. Jon Bruce Thoen ("Thoen") filed comments and a counterproposal, requesting the allotment of Channel 9 to Norwalk-Downey, California,[2] to which petitioner responded. The City of Norwalk ("City") filed a request for an extension of time to file comments.[3] No other comments were received.

2. The *Notice* advised that although Channel 9 is the only local transmission service in Norwalk, petitioner's proposal to remove that service would not result in a net loss or gain of television transmission service since Norwalk is located within the Los Angeles Urbanized Area, as defined by the United States Census. Therefore, this proposal is distinguishable from instances in which a licensee may seek to remove the sole local transmission service from a distant suburb in order to reallot that channel to a neighboring Urbanized Area. This view is further supported by the fact that the Commission's Review Board, in the context of a comparative hearing involving this channel, denied a request to include a Section 307(b) issue concerning the licensing of the channel to either Norwalk or Los Angeles, stating that "there is no indication that a meaningful 307(b) choice between Los Angeles and Norwalk could be made." *RKO General, Inc.*, 5 FCC Rcd 517 at 519 (1966).

3. In view of the above, we believe the public interest would be served by realloting Channel 9 from Norwalk to Los Angeles, California. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license of Station KCAL-TV to specify operation on Channel 9 at Los Angeles in lieu of its present allotment at Norwalk, California.

4. Channel 9 can be reallotted to Los Angeles in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[4] The proposed reallotment is not precluded by the Commission's *Order* in *Advanced Television Systems and Their Impact on Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1987, since no change in technical parameters is involved.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 28, 1991,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Los Angeles, California	2,4,5,7,9,11,13,22, *28,34,*58-
Norwalk, California	--

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Fidelity Television, Inc. (BLCT-870420KH) for Station KCAL-TV, IS MODIFIED effective **October 28, 1991,** to specify operation on Channel 9 at Los Angeles, California, in lieu of Norwalk, California, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLCT-870420KH) except the community, as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

---

[1] As stated in the *Notice*, the Television Table of Allotments was modified to reflect the allotment of Channel 9 at Norwalk as its community of license, rather than Los Angeles. *See Order*, 6 FCC Rcd 30 (1991).

[2] Thoen's counterproposal was late filed and was not served on the petitioner, in violation of Sections 1.420(a), (c) and (d) of the Commission's Rules. *See also* paragraphs 3(a) and 4 of the Appendix to the *Notice*. Consequently, Theon's comments have not been accepted. Therefore, petitioner's responsive comments thereto will not be discussed. Furthermore, Thoen's counterproposal is substantively defective in that he proposes the reallotment of Channel 9 to Norwalk-Downey, California. Thoen is not the permittee or licensee of Station KCAL-TV and, therefore, he cannot propose the reallotment of the channel to another community. In addition, Commission policy generally disfavors hyphenated allotments, except in circumstances not relevant herein. *See, e.g., Eagle Nest and Angel Fire, New Mexico*, 3 FCC Rcd 2520 (1989).

[3] City requested a 21-day extension of the comment deadline in order to permit its staff to study "any possible consequences" of the proposal or, in the alternative, permission to file comments during the reply comment period. However, City failed to file any additional comments in this proceeding. Therefore, the request for extension of time is moot.

[4] Coordinates at the licensed site of Station KCAL-TV are 34-13-38 and 118-04-00.

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license (BLCT-870420KH) except for the community as specified above and a license application (FCC Form 302) is filed within ten (10) days of commencement of program tests.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Fidelity Television, Inc., licensee of Station KCAL-TV, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-261

In the Matter of

Amendment of Section 73.202(b), RM-7789
Table of Allotments,
FM Broadcast Stations.
(Callahan, Florida, and)
St. Marys, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 29, 1991; Released: September 11, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Rowland First City Radio, Inc. ("petitioner"), licensee of Station WAIA(FM), Channel 227C2, St. Marys, Georgia, requesting the reallotment of Channel 227C2 from St. Marys, Georgia, to Callahan, Florida, and the modification of Station WAIA(FM)'s license to specify Callahan as its community of license.

2. In support of its proposal petitioner submits that the allotment of Channel 227C2 to Callahan is mutually exclusive with its present allotment to St. Marys, and that it does not intend to move from its presently authorized transmitter site. Petitioner states that the reallotment of Channel 227C2 will provide Callahan with first local aural transmission service, while continuing to provide its current signal strength to the residents of St. Marys. Petitioner points out that St. Marys (population 3,596),[1] has one FM station, WAIA(FM) and one fulltime AM facility, WECC(AM), whereas Callahan (population 869) may eventually be served by Station WELX(AM).[2] Petitioner states that Station WELX(AM) is not on the air and a visit to the WELX transmitter site revealed that WELX is not likely to initiate program test soon. Therefore, petitioner submits that its proposal would bring an operational first local transmission service to Callahan, and would not deprive St. Marys of its only local transmission service.

3. A staff engineering analysis has determined that Channel 227C2 can be allotted to Callahan in compliance with the Commission's minimum distance separation requirements with a site restriction 26.5 kilometers (16.5 miles) east of the community at petitioner's current transmitter site.[3]

4. We believe the proposal warrants further consideration, as it could provide Callahan with its first local aural transmission service or, if Station WELX(AM) is on the air, its first local FM transmission service. The proposal would not deprive St. Marys of its only aural transmission service and the use of Channel 227C2 at Callahan is mutually exclusive with its present allotment at St. Marys. As requested, we will also propose to modify petitioner's license for Station WAIA(FM) to specify Callahan as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 227C2 at Callahan or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Callahan, Florida	--	227C2
St. Marys, Georgia	227C2	--

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036
(Attorney for Rowland First
City Radio, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

[1] Population figures are from the 1980 U.S. Census.
[2] Florida AM, Inc. holds a construction permit (BMP-901119AE) to operate on Station WELX(AM).
[3] The coordinates for Channel 227C2 at Callahan are North Latitude 30-33-22 and West Longitude 81-33-13, the authorized site of Station WAIA(FM).

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-606

In re Applications of

RAYMOND J. AND JEAN-MARIE STRONG — File No. BPH-871223MQ

RICHARD P. BOTT — File No. BPH-871224ME

BELZ BROADCASTING CO. — File No. BPH-871223MI

For Construction Permit for
New FM Station, Channel 225A,
Bartlett, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1991; Released: September 13, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Board has before it: (1) the *Initial Decision*, 6 FCC Rcd 553 (1991)(*I.D.*), issued by Administrative Law Judge Edward J. Kuhlmann (ALJ); (2) exceptions thereto filed by Raymond J. and Jean-Marie Strong (or Strong) and by Richard P. Bott[1]; and (3) replies to those exceptions filed by Belz Broadcasting Co. and Richard P. Bott. Oral argument was heard on August 9, 1991.

2. The *I.D.* awarded the Construction Permit at contest to Belz Broadcasting, the only one of the three remaining applicants to whom the ALJ accorded ownership/management integration credit, a factor of "substantial importance" under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) (*Policy Statement*). Upon review of the exceptions, and as explained below, we must remand this case for further hearing.

3. Julianne Belz, a resident of Memphis, Tennessee, is said to be the president and sole stockholder of her corporate applicant, and she proposed to integrate full-time as the general manager of her intended station. *I.D.*, para. 92. The ALJ awarded her 100% full-time integration credit, augmented by several years' residence and civic activities within the proposed station's service area. *Id.*, para. 93. (And, although the ALJ -- upon denying any integration credit to either Strong or Bott -- did not find it necessary to award Belz an additional "gender preference," *see, e.g., Jerome Thomas Lamprecht*, 3 FCC Rcd 2527 (1988), she would be entitled currently to that comparative preference unless she also is denied management integration credit or found personally unqualified.[2])

4. In its exceptions, Strong asserts that the ALJ erred in denying its June 27, 1990 petition to add a misrepresentation issue against Belz. This exception is based, in the main, on two Belz application amendments, one filed on February 29, 1988 and the second filed on November 14, 1989, relating to Julianne (Pollack) Belz and her February 1988 "appointment" as the Community Affairs Director of KWLN-FM, Osceola, Arkansas,[3] a station owned at that time by her parents and her brother William (d/b/a Pollack Broadcasting Co.). Belz' February 29, 1988 amendment had declared:

> Julianne Belz, sole stockholder of Belz Broadcasting Company, has been appointed Community Affairs Director for FM station KWLN, Osceola, Arkansas. If the application of Belz Broadcasting Company for the Bartlett FM station is granted pursuant to the comparative hearing process, Ms. Belz will resign this position and any other employment with KWLN and any other broadcast station prior to the time the Bartlett station goes on the air.

Her November 14, 1989 amendment reported (emphasis added):

> Julianne Belz *ceased her employment* as Director of Community Affairs at FM station KMPZ (formerly KWLN), Osceola, [Arkansas], *as of* June 1, 1988.

5. However, it developed that (1) Pollack Broadcasting had, on February 26, 1988 -- three days *prior to* Belz' initial amendment -- entered into an asset agreement to sell KWLN to The Dittman Company; and that (2) Julianne Belz never held any position at that station at any time, a fact she admitted later at hearing. Tr. 1537; 1556. In further fact, it appears that the sale of KWLN was effectuated on June 1, 1988, Tr. 1552, the very date on which her November 1989 amendment reported that her "employment" at KWLN had "ceased." Thus it is contended here by Strong[4]:

> Apparently in an effort to make her integration proposal appear more credible, despite her lack of work experience of any kind since her marriage, Mrs. Belz represented to the Commission, in an amendment to her application filed with the Commission on February 29, 1988, that she had been appointed Community Affairs Director at a Memphis area station (in Osceola, Arkansas) owned by her parents and brothers, (Tr. 1531-3), even though her family had entered into an agreement to sell the station three days before that amendment. (Tr. 1555-8.) In November, 1989, over 20 months later, she again amended her application to state that she "ceased" her employment as of June 1, 1988. (Tr. 1536.) In truth, however, she never worked at the station. (Tr. 1537, 1556.) On cross-examination, Mrs. Belz sought to distance herself from these inconsistencies by attributing them to her attorney's drafting of the amendments and inattentive review by herself. (Tr. 1558-9.)

6. In response to Strong's petition to add a misrepresentation issue based (in part) on Belz' claims with respect to her "employment" at KWLN, Belz submitted (1) that although her father and her brother had quite actively encouraged her to take the Community Affairs Director position at KWLN in early 1988, *see* Tr. 1548-1549, they had not told her that the station was for sale or that it had

been sold on February 26, 1988, three days before she filed her initial amendment; (2) that her communications attorney, who had filed her February 29, 1988 amendment reporting her new management position at KWLN, was simultaneously assisting her family in the sale of KWLN from Pollack Broadcasting to Dittman, but her attorney did *not* inform Julianne Belz of the pending sale[5]; (3) that although she learned of the sale of KWLN very shortly thereafter and never undertook employment at KWLN, she never advised her attorney (or the FCC) of this latter fact until more than 20 months later, when she filed her second amendment claiming that she had "ceased her employment as Director of Community Affairs . . . as of June 1, 1988"; and (4) that although she personally reviewed that second amendment in November 1989, she did not correct "counsel's" misleading language because she felt that she had been, in fact, somehow *connected with* KWLN until June 1988.[6]

7. The ALJ considered the Strong's petition to add a misrepresentation issue against Julianne Belz based upon these amendments (as well as the alleged role of her husband Martin), but declined because:

> The presiding officer has had an opportunity to observe both Julianne Belz and Martin Belz. He found their explanations of amendments regarding Ms. Belz's position at the Osceola, Arkansas station and Mr. Belz's role in the applicant believable. Their demeanor was calm and they answered questions in a straightforward manner. Their testimony was marked by their willingness to answer all questions directly and honestly.
>
> Ms. Belz's explanation about her position at her family's station and her listing her spouse as a director are plausible. She has stated that she never intended to seek broadcast experience. As for Strong's conjecture, in its reply, that she wanted to demonstrate employment experience, there was no reason to make up work experience since she has been a teacher and an active fund raiser for community causes.

Memorandum Opinion and Order, FCC 90M-2598, released August 22, 1990 at paras. 10-11. [7]

8. *Discussion*. There is no question that Belz' November 1989 application amendment was flatly false, notwithstanding Julianne Belz' testimony that the plain inaccuracy reflected therein was false largely to the degree that it used the term "ceased her *employment* . . . as of June 1, 1988" rather than "ceased her *connection*. " *See supra* note 6. Both before the ALJ and now before the Board, Belz contends that she intended no deception in her amendments because "Ms. Belz has not claimed broadcast experience at any point in this proceeding," and that therefore she had no motive to dissemble as to her "employment" at KWLN.[8] Rather, Belz asserts that the initial "amendment was filed in an abundance of caution to notify the Commission of a nascent connection with a broadcast station . . . ."[9] Belz agrees with the ALJ that the failure to rescind or correct her initial amendment within 30 days, *see* 47 CFR § 1.65, was simply an oversight on the part of Julianne Belz, *see* Tr. 1546; and further that, had she reviewed "more carefully" her November 1989 amendment, she would have represented instead that her "*connection*" to KWLN had ceased as of June 1, 1988. *Id.*

9. We agree with Strong that formal misrepresentation and candor issues should have been added and tried against Belz, for the court has monished the Commission against avoiding a full evidentiary hearing "when it is shown a good deal of smoke." *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985); *see also David Ortiz Radio Corp. v. FCC*, No. 90-1412, slip op. at 10-16 (D.C. Cir. Aug. 20, 1991). No particularly sensitive effluvium detector was required here to alert that a false representation was contained in the Belz amendment of November 1989. The patent misrepresentation therein became evident in the course of considering Strong's June 1990 petition to add that very issue against Belz. Indeed, as the *David Ortiz* court recently reminded:

> "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity" ordinarily suffices to demonstrate fraudulent intent. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).

Slip. op. at 13. The question of Belz' intent, we must say, is not conclusively resolved by the several demeanor observations made by the ALJ when he rejected Strong's enlargement petition. Much more evidence, accompanied by specific findings of fact and conclusions of law, is required before the Board can legally vouchsafe Belz' basic license qualifications.

10. Thus, we are given no reason here to accept William Pollack's curious claim that his sister, while actively seeking employment at KWLN, kept secret from her family the fact that she *herself* had filed for a nearby FM frequency that would have competed with KWLN, *see supra* note 5, had not Pollack Broadcasting just as "secretly" sold that station just after (or just before) "appointing" Julianne Belz as its new Community Affairs Director. Testimony, under oath and with opportunity for cross-examination, is needed from Julianne Belz, William Pollack, and from Belz' parents to explain persuasively the reasons for all of this purported concealment within the Pollack clan.[10] Next, without further probative evidence, we cannot uncritically accept Belz' claim that her own attorney (1) apparently did not inform Pollack Broadcasting, also his client, that *she* had filed for this Bartlett FM frequency; or (2) did not inform her on (or about) February 29, 1988 that the official report of her new management "appointment" at KWLN to the FCC might well require corrective revision. Moreover, in light of Belz' own testimony that she was keenly aware from her attorney that she "was to keep her application updated," Tr. 1546, and hence filed her initial amendment, we would expect a further explanation of why Belz did not amend within 30 days after it became clear that she would *not* hold the position at KWLN she had very carefully reported to the FCC.

11. Finally, we are unconvinced at this point by Belz' defense that she has never claimed credit for past broadcast experience, but sought the community affairs management position at KWLN merely to "gain experience" in broadcasting. First, inasmuch as the 1965 *Policy Statement* affords a comparative advantage for any past broadcast experience, *see* 1 FCC 2d at 396, most applicants with even a trace element of media background are vigorous to claim it. *See, e.g., Ronald Sorenson*, 6 FCC Rcd 1952, 1953 (1991). Second, and as observed by Strong, had Belz merely wished to "gain experience" at a local broadcast

station, the sale of KWLN was certainly not fatal to her aspiration, since the Pollacks continued to own a companion Osceola AM station.[11] Strong's point here seems well taken, at least on the record thus far. Third, at the time Belz filed its second amendment claiming that her previously reported management position at KWLN had "ceased," it was entirely unknown whether she *would* attempt to claim *some* broadcast experience, since the formal Integration Statements were not due or filed in this proceeding until April 4, 1990.[12] In that *precise* regard, we are as discomfited as was the ALJ by Julianne Belz' repeated asseverations that she did maintain some " *connection* " to KWLN until June 1988, and her repeated suggestion of only a semantic flaw in her November 1989 amendment. *See supra* note 6; *see also* Tr. 1546 (to the same effect).

CONCLUSION

12. We recognize that the ALJ has previously made preliminary demeanor and credibility findings concerning Julianne Belz when he summarily declined to add a formal misrepresentation issue. And we appreciate that deference is generally owed to an ALJ's assessment of witness credibility. *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). [13] Nevertheless, we are constrained to hold that the evidence of record warranted a more thorough exploration of Belz' actions and defenses, including all of the additional witness testimony we have herein indicated, and we must require a supplemental hearing and initial decision:

1. To determine whether Julianne Belz intentionally misrepresented, or lacked candor with respect to, her February 29, 1988 application amendment;

2. To determine whether Julianne Belz intentionally misrepresented, or lacked candor with respect to, her knowledge of the status of KWLN as of the date of the aforestated amendment;

3. To determine whether Julianne Belz failed, pursuant to 47 CFR § 1.65, to inform the Commission that her aforestated amendment was inaccurate or that circumstances had changed, and whether any such failure was intentional; and,

4. To determine whether Julianne Belz intentionally misrepresented, or lacked candor with respect to, her November 14, 1989 application amendment, either in that amendment or in her later representations with regard thereto.

13. ACCCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for further hearing consistent with this opinion and for preparation of such Supplemental Initial Decision as may be warranted by a supplemental record;

14. IT IS FURTHER ORDERED, That the Motion to Strike filed by Raymond J. and Jean-Marie Strong, and the Opposition To Motion To Strike filed by Belz Broadcasting Company ARE DISMISSED as moot;

15. IT IS FURTHER ORDERED, That the Petitions For Leave To Amend filed by Belz Broadcasting Company on April 1, 1991, April 30, 1991, and June 3, 1991 ARE GRANTED, and the Petition For Leave To Amend filed by Richard P. Bott on May 1, 1991 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Another applicant for this frequency, Bartlett Media, was found financially unqualified in the *I.D.*, and did not file exceptions. Its application will be dismissed for failure to prosecute. 47 CFR § 1.276(f).

[2] The Commission's "gender preference" policy is frontally challenged in *Jerome Thomas Lamprecht v. FCC*, No. 88-1395 (D.C. Cir.) (argued Jan. 25, 1991). Strong here "preserve[s] the right to object" to the Commission's policy. Strong Exceptions at 37 n. 24.

[3] Although KWLN-FM (now KMPZ-FM) is licensed to Osceola, Arkansas, we are advised that the station's "studios have been located at . . . Memphis, Tennessee for many years." Bott Exceptions at 12 n.5. Bartlett is contiguous to Memphis. Belz Reply at 14.

[4] Strong Exceptions at 41-42 (footnote omitted). *See also* Bott Exceptions at 13.

[5] The Pollack Broadcasting application for the assignment of KWLN was (apparently) filed with the FCC on March 1, 1988, according to William Pollack, the brother of Julianne Belz. *See* Belz Opposition To Comments Re Petition To Enlarge Issues, filed July 19, 1990, Attachment G (Declaration of William Pollack) at 2. William Pollack's Declaration makes several other claims. First, that while he had actively encouraged his sister's Community Affairs Director position at KWLN, he did not apprise her of its imminent sale because he "was concerned that she would be unhappy at not having been an investor in KWLN, as the investment suddenly promised to be profitable . . . ." *Id.*, at 3. And, second, as unusual as that claim might seem (since the proposed assignment would be public at the FCC), Pollack also declared that his sister did not inform *him* that *she* had filed for this competing Memphis-area FM frequency, a fact he allegedly did not learn of until a February 1988 notice in Broadcasting Magazine. *Id.*, at 1.

This intrafamilial surreptitiousness waxes even more interesting, since Pollack's Declaration likewise claims that one of the reasons he actively encouraged his sister's involvement in the community affairs management of KWLN (which he and his parents were nonetheless about to sell) was that he was preoccupied at the time not only overseeing a Paducah, Kentucky radio station, but enmeshed as well in "an extremely complicated process of buying a UHF television station out of bankruptcy in Alexandria, Louisiana." *Id.*, at 2. *Mirabile dictu*, a one-third interest in that same television station is owned by Martin Belz, Julianne's husband (and *also* the vice president/secretary of Belz Broadcasting). *See I.D.*, para. 95. However, this alleged Pollack/Belz secrecy syndrome perhaps reached its zenith when, according to the testimony of Martin Belz, he agreed to his wife's request to divest his interest in that Louisiana television station (acquired *after* the filing of the wife's instant FM application) if she received this Bartlett FM frequency, though his wife gave him no reason whatsoever for her request, and he never inquired. When queried on this matter at hearing, Martin Belz responded (Tr. 1363-1364):

Q. Well, what is your understanding -- did you have an understanding it was necessary for you to agree to sell this [television] station because you were an officer of Julie's [radio] corporation?

A. I had -- Julie told me that -- that I should, you know, that it-- that I should, you know, I should sell -- she would like me to sell -- to -- to sell that station if she got the license for the Bartlett radio station. I agreed that that would be fine with me.

Q. She gave you no explanation as to why she wanted you to do that. Is that correct?

A. No. I didn't ask her why.

Q. Did you ask anybody else why?

A. No I did not.

[6] When questioned by the ALJ about the inaccuracy of her November 1989 amendment, Ms. Belz responded (Tr. 1552-1553; emphases added):

BY JUDGE KUHLMANN:

Q. But I think the pertinent question is why you said that you *ceased* something you never started?

A. Well, I guess I should have said I ceased my *connection* because my *connection* did start.

Q. You had *no connection* with this station, *you never went there, did you* ?

A. *Yeah, I had gone to the station, not to talk about this but I had been in the station.*

Q. Oh, no, no, no, but I meant to do the job that you said that you were going to do?

A. No. That is correct.

Q. So that if the amendment would have been accurate, it would have said that you never began *employment* there, that you never had any employment there, and that that position didn't work out and that would have been the accurate answer, would it not have been?

A. I think it -- it would have.

Q. No, I mean to say that you have *ceased employment* and you never had any *employment* there?

A. That's correct.

Q. And I'm sure they never gave you a penny?

A. I was -- no, they didn't, but I was really set on the beginning of it, notifying [counsel], *making sure I kept this up-to-date, I knew to do that.*

So, when I did that --

Q. Well, whose idea was it to say that you *ceased employment*?

A. It was counsel's.

Q. Did -- did -- did -- had you told counsel that you had worked there?

A. *No*, but I did tell counsel that I was *planning* to work there.

Q. Well, I don't know what else to ask you. I think you have answered the questions I have.

[7] Martin Belz, originally a director of Belz Broadcasting (and still its vice-president/secretary), was dropped as a director of his wife's applicant corporation upon advice of counsel, although "[o]ne subsequent amendment to the application . . . inadvertently and incorrectly referred to him as a director." Belz Reply at 11.

[8] *Id.*, at 10. Even were we to accept Belz' claim that the clear misrepresentation contained in the November 1989 amendment was not material because she intended to gain no slight comparative advantage, the Commission has recognized "[t]he fact of concealment may be more significant than the facts concealed." *Character Policy Statement*, 102 FCC 2d 1179, 1210 & n.77 (1986) (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946)).

[9] Belz Reply at 10.

[10] The credibility of William Pollack is critical, since Julianne Belz' claim that she was completely unaware of the prior sale of KWLN when she filed her February 1988 amendment is corroborated *only* by her brother at this point. Her parents, the other owners of KWLN, have not been heard from on the claim that their daughter was encouraged by them to manage community affairs at KWLN, *see* Tr. 1549 (father thinks KWLN appointment "great"), yet kept in the dark as to its contemporaneous sale. Their testimony is important because, as Belz itself observes:

> In this regard, we note that a Community Affairs Director works with service area organizations to build relationships that bear fruit over the long term. When a station is under contract to be sold, a *reasonably prudent licensee* would not assign a new Community Affairs Director to spend time building bridges in which the new owner may have no interest, or making plans and commitments which the new owner might not fulfill.

Belz Reply at 10 n.5 (emphasis added). We can concur; but would a *"reasonably prudent licensee"* have allowed Belz to be misled or to possibly misinform the FCC?

[11] Strong Reply To Opposition To Petition To Enlarge Issues, filed July 17, 1990 at 5 n.3.

[12] Belz Reply at 11.

[13] At the same time, the *WHW Enterprises* court chided the Commission to reject representations that are "at best highly implausible and at worst utterly ridiculous." 753 F.2d at 1141. We do not say now that Belz' representations anent the amendments fall into that category: merely that sufficient question was raised below to justify a full evidentiary hearing on Belz' truth and candor. *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exits.

The following Managing Director decisions are released for information:

Roberts Broadcasting, Inc. - Request for Refund of Filing Fee - Station WMZK-FM, Merrill, Wisconsin - **Granted** (June 5, 1991).

Susquehanna Radio Corp. - Request for Waiver of Filing Fee - Station WTKN, Pinellas Park, Florida - **Granted** (June 13, 1991)

Stephen E. Powell - Request for Refund of Filing Fee - New FM radio station at Farmington, New Hampshire - **Granted** (June 13, 1991).

NWLA Broadcasting Company - Request for Refund of Filing Fee - New FM broadcast station at Homer, Louisiana - **Granted** (June 19, 1991).

Jeannette Mathis - Request for Refund of Filing Fee - New FM station at Magee, Mississippi - **Granted** (June 19, 1991).

In-Flight Phone Corporation - Request for a fee determination and refund - Applicant for authority to construct and operate facilities in the Air-Ground Radiotelephone Service - **Granted** (June 24, 1991).

Nancy K. Hinson Grubbs - Request for Hearing Fee - new FM radio station at Comfort, Texas - **Granted** (June 24, 1991).

Student Media Center of the University - Request for Refund of Hearing Fee - new FM station at University, Mississippi - **Granted** (June 24, 1991).

WRVM, Inc. - Request for Refund of Filing Fee - An application for a construction permit for minor change - **Denied** (August 6, 1991).

Foxfire Communications, Inc. - Request for Refund of Filing Fee-licensee of station KJFM(FM), Louisiana, Missouri - **Denied** (August 6, 1991).

Anzek, Louis M. - Request of a Refund of Hearing Fee - A new FM station at Lebanon, Tennessee - **Granted** (August 6, 1991).

Mel-Mike Enterprises, Inc. - Request for Refund of Hearing Fee - A new FM station at Central, New Mexico - **Granted** (August 6, 1991).

KBEW, Inc. - Request for Refund of Hearing Fee - A new FM broadcast station on Channel 251C3 at Blue Earth, Minnesota - **Granted** (August 20, 1991).

Scout Broadcasting Corporation - Request for Refund of Filing Fee - Licensee of radio station KXXR, Liberty, Missouri - **Granted** (August 27, 1991).

Gay, John A. Jr. - Request for Refund of Hearing Fee - A new FM radio station at Amarillo, Texas - **Granted** (August 30, 1991).

Country Investments Limited Partnership - Request for Refund of Filing Fee - New FM station in Idaho Falls, Idaho - **Denied** (August 30, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-263

In the Matter of

Amendment of Section 73.202(b), RM-7793
Table of Allotments,
FM Broadcast Stations.
(Los Alamos, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 30, 1991; Released: September 12, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jeffrey Rochlis ("petitioner") requesting the allotment of Channel 298C to Los Alamos, New Mexico, as the community's third local commercial FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 298C to Los Alamos since it could provide the community with an additional local FM service. Channel 298C can be allotted to Los Alamos in compliance with the Commission's minimum distance separation requirements with a site restriction of 38.1 kilometers (23.7 miles) northeast to avoid short-spacings to Station KMYI, Channel 296C2, Armijo, New Mexico, and Station KAMX-FM, Channel 300C, Albuquerque, New Mexico.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Los Alamos, New Mexico	253C, 294C1	253C, 294C1, 298C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lewis J. Paper, Esq.
Paul J. Sinderbrand, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 298C at Los Alamos are North Latitude 36-04-51 and West Longitude 105-58-41.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-264

In the Matter of

Amendment of Section 73.202(b), RM-7791
Table of Allotments,
FM Broadcast Stations.
(Bismarck, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 30, 1991; Released: September 12, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Christopher G. Abbott ("petitioner") requesting the allotment of Channel 248C to Bismarck, North Dakota, as the community's sixth local commercial FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 248C to Bismarck because an interest has been expressed in providing the community with an additional local FM service. Channel 248C can be allotted to Bismarck in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.4 kilometers (2.1 miles) southeast to avoid a short-spacing to vacant but applied-for Channel 250A at Beulah, North Dakota.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bismarck, North Dakota	225C, 233C, 243C, 254C, 268C	225C, 233C, 243C, 248C, 254C, 268C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Christopher G. Abbott
1910 Santa Gertrudis Drive
Bismarck, North Dakota 58501
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply commment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes and *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 248C at Bismarck are North Latitude 46-47-35 and West Longitude 100-48-18.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-265

In the Matter of

Amendment of Section 73.202(b), RM-7795
Table of Allotments,
FM Broadcast Stations.
(Ashland, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 30, 1991; Released: September 12, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jeffrey Rochlis ("petitioner") requesting the allotment of Channel 298C2 to Ashland, Oregon, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 298C2 to Ashland, Oregon, since it could provide the community with its second local and first competitive commercial FM service. Channel 298C2 can be allotted to Ashland in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.3 kilometers (3.3 miles) west to avoid a short-spacing to Station KKRB, Channel 295C1, Klamath Falls, Oregon.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ashland, Oregon	270C	270C, 298C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lewis J. Paper, Esq.
Paul J. Sinderbrand, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 298C2 at Ashland are North Latitude 42-11-48 and West Longitude 122-46-23.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-266

In the Matter of

Amendment of Section 73.202(b), RM-7794
Table of Allotments,
FM Broadcast Stations.
(Redmond, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 30, 1991; Released: September 12, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jeffrey Rochlis ("petitioner") requesting the allotment of Channel 259C3 to Redmond, Oregon, as the community's fourth local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 259C3 to Redmond since an interest has been expressed in providing the community with an additional local FM service. Channel 259C3 can be allotted to Redmond in compliance with the Commission's minimum distance separation requirements with a site restriction of 5 kilometers (3.1 miles) east to avoid a short-spacing to Station KRKT-FM, Channel 260C, Albany, Oregon.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Redmond, Oregon	224A, 275C, 298C1	224A, 259C3, 275C, 298C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lewis J. Paper, Esq.
Paul J. Sinderbrand, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Divison
Mass Media Bureau

[1] The coordinates for Channel 259C3 at Redmond are North Latitude 44-17-14 and West Longitude 121-06-56.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-173

In the Matter of

Amendment of Section 73.202(b), RM-7558
Table of Allotments,
FM Broadcast Stations.
(Jackson, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1991; Released: September 12, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Teton Broadcasting Limited Partnership ("petitioner"), permittee of Station KZJH-FM, Channel 239C, Jackson, Wyoming, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3633 (1991), requesting the substitution of Channel 237C for Channel 239C at Jackson and the modification of its authorization accordingly. Petitioner filed comments in support of the proposal stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C for Channel 239C at Jackson, Wyoming, and the modification of the construction permit of Station KZJH-FM to specify the new channel, since it would allow Station KZJH-FM to provide Jackson with clear radio reception and alleviate the existing problem with intermodulation interference to the Wyoming Highway Department's mobile radio system. Channel 237C can be allotted to Jackson at petitioner's present construction permit site in compliance with the Commission's minimum distance separation requirements.[1] As proposed, we are modifying the construction permit of Station KZJH-FM to specify Channel 237C in lieu of Channel 239C.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jackson, Wyoming	237C, 245C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Teton Broadcasting Limited Partnership for Station KZJH-FM, Jackson, Wyoming, IS MODIFIED to specify operation on Channel 237C in lieu of Channel 239C, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KZJH-FM's construction permit, BLH-850712PS, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with contruction permit BLH-850712PS, except for the channel as specified above and a license application (FCC Form 302) within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C at Jackson are North Latitude 43-27-40 and West Longitude 110-45-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-143

In the Matter of

Arizona Region Public
Safety Plan

ORDER

Adopted: September 4, 1991; Released: September 12, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On March 12, 1991, Region 3 (Arizona) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On May 6, 1991, Arizona filed revisions to the plan, based on conversations with the Commission's staff.

2. The Arizona plan was placed on Public Notice for comments on May 16, 1991, 56 FR 23707 (May 23, 1991). On June 24, 1991, the American Private Radio Association (APRA) filed a motion requesting an extension of the deadlines for comments and reply comments. The request was granted on July 5, 1991. The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Arizona and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Arizona. We note, however, that the channel allotments contained in the Arizona Plan may need to be modified to conform to the Memorandum of Understanding between the United States and Mexico concerning use of the 821-824/866-869 MHz bands.

4. Therefore, we accept the Arizona Public Safety Plan, subject to the provisions of paragraph 3. Furthermore, licensing of the 821-824/866-869 MHz band in Arizona may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

AALERT PAGING COMPANY OF SAN FRANCISCO — File No. 63500-89-JSG

Notice of Apparent Liability for Forfeiture Penalty for failure to construct Station KNKK816 in the Public Land Mobile Service at Danville, California

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1991; Released: September 13, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. AAlert Paging Company of San Francisco (AAlert) has filed a "Request for Remission or Reduction of Forfeiture" of the $5,000.00 forfeiture imposed by the Mobile Services Division (MSD) in a Notice of Apparent Liability for Forfeiture (*NALF*) issued February 14, 1989. For the reasons stated below, we are rescinding the forfeiture.

II. DISCUSSION

2. AAlert's construction period for a one-way paging facility on frequency 931.9875 MHz for station KNKK816 at Danville, California, expired on November 23, 1988. AAlert began construction of the facility on December 20, 1988 (*i.e.*, 27 days after the authorization had expired). On December 21, 1988, AAlert filed FCC Form 489, requesting reinstatement of the authorization and notifying the MSD that it had completed construction of the facility.[1] Because AAlert failed to construct the paging facility within one year after receiving authorization as required by Section 22.43(a)(2) of the Commission's rules, the MSD issued the *NALF*, finding that an apparent violation of Section 22.43 of the Commission's Rules had occurred for willfully violating the terms of its authorization and imposed a forfeiture of $5,000.00.

3. AAlert asserts that no forfeiture is warranted because Section 22.43(a)(3) of the Commission's rules does not prohibit construction during the 30-day reinstatement period. The Commission's rules are unclear regarding a situation where the construction was completed after the authorization expired, while an application for reinstatement was pending and before the 30-day reinstatement period expired. In view of this uncertainty in our rules, we believe that, under the circumstances, sanctions are not appropriate.

III. ORDERING PARAGRAPH

4. Accordingly, IT IS ORDERED that the request for remission or reduction filed by AAlert Paging Company of San Francisco IS GRANTED and that the forfeiture IS RESCINDED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Section 22.43(a)(3) of the Commission's rules provides:

> If construction is not completed within the time period set forth in this rule the authorization will automatically expire. . . . Within 30 days after the authorization expires an application for reinstatement may be filed on FCC Form 489. An application for reinstatement will only be considered if the application demonstrates that the failure to file a timely application for extension or notification of completion of construction was due to causes beyond the applicant's control.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

David L. Hollingsworth File No. 63500-91-24-RPS
d/b/a Worland Services

Notice of Apparent Liability for
Forfeiture Penalty for Station KPO254
in the Public Land Mobile Service at
Cody, Wyoming

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 6, 1991; Released: September 13, 1991

By the Chief, Mobile Services Division:

1. On September 20, 1989, the Commission granted an authorization to David L. Hollingworth d/b/a Worland Services (Worland) to change the frequency of a control facility of Station KOP254 from 152.57 MHz to 152.06 MHz, located at Cedar Mountain, 6 Miles West of Cody, Wyoming. The expiration date of the authorization was September 7, 1990. The Commission has no record that the Notification of Status of Facilities, FCC Form 489, was ever filed stating that the construction had been completed and the station went on the air on August 17, 1990. On April 17, 1991, the Commission received Worland's request for Special Temporary Authority (STA) to continue to operate the 152.06 MHz control facility of Station KOP254 at Cedar Mountain, Wyoming, pending Commission action on an application for reinstatement of the expired authorization, which was filed with Worland's STA request.

2. Section 22.9(b)(1) of the Commission's rules states:

> Notification of status of facilities. (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Worland commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Worland's failure to file a Form 489 until April 17, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), the base forfeiture amount for failing to file required forms is $30,000. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture to $6,000 because failing to file an FCC Form 489 is a relatively minor violation and because Worland voluntarily disclosed its failure to file the FCC Form 489.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b) and Section 1.80 of the Commission's rules 47 C.F.R. Sec. 1.80, IT IS ORDERED that David L. Hollingworth d/b/a Worland Service IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule continuing until April 17, 1991.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

JOYCE COMMUNICATIONS, INC. File No. 63500-91-23-RPS

Notice of Apparent Liability for
Forfeiture for Station KWU489
in the Public Land Mobile Service at
Bonita Springs, Florida

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 6, 1991; Released: September 13, 1991

By the Chief, Mobile Services Division:

1. On December 23, 1986, the Commission granted authority to construct and operate a control facility for Station KWU489 on frequency 75.58 MHz in the Public Land Mobile Service located at Bonita Springs, Florida. The authorization had an expiration date of December 9, 1987. The Commission has no record that an FCC Form 489, required by Section 22.9(b)(1) of the Commission's rules, was ever filed, notifying the Commission that the construction was completed and the facility was ready for operation. On April 25, 1991, the Commission received a Request for Special Temporary Authority from Joyce Communications, Inc. (Joyce) to resume operations at the Bonita Springs facility pending Commission action on an application for reinstatement of the expired authorization. In this request, Joyce states that the construction was completed prior to December 9, 1987, the expiration date of the construction permit, and operation initiated on December 8, 1987. Joyce further indicates that it discovered at a later date that it had failed to file an FCC Form 489 and accordingly turned off the 75.58 MHz transmitter on March 26, 1991.

2. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Joyce commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states, in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) . . . willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation or order issued by the Commission under this chapter . . . shall be liable to the United States for forfeiture penalty.

We find that Joyce's failure to file the required FCC Form 489 until March 26, 1991, constitutes willful and repeated conduct within the terms of the statute.

4. Pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), the base forfeiture amount for failing to file required forms is $30,000. Consistent with the *Policy Statement*, we are adjusting downward the amount to $6,000 because failing to file an FCC Form 489 is a relatively minor violation and because Joyce voluntarily disclosed its failure to file the FCC Form 489.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Joyce Communications, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule continuing until March 1991.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

PAGEPROMPT USA File No. 63500-91-22-BFW

Notice of Apparent Liability for
Forfeiture Penalty for Station KNKI691
in the Public Land Mobile Service at
Malibu, California

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 6, 1991; Released: September 13, 1991

By the Chief, Mobile Services Division:

1. On March 2, 1990, the Commission granted the application of PagePrompt USA (PagePrompt) for authorization to construct facilities to operate on frequency 931.5625 MHz for Station KNKI691 at Malibu, California. On February 18, 1991, PagePrompt constructed the Malibu station and commenced operation that same day without filing FCC Form 489 notifying the Commission of completion of construction of the Malibu facilities. This failure to notify the Commission violates Section 22.9(b)(1) of the Commission's rules. On March 22, 1991, PagePrompt filed FCC Form 489.

2. PagePrompt claims that the filing of FCC Form 489 was delayed because the records for the Malibu transmitter site were mistakenly filed with those for another PagePrompt transmitter site that currently is under construction. PagePrompt asserts that it filed its FCC Form 489 immediately upon discovering that it failed to file the form.

3. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because PagePrompt commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or if any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that PagePrompt's failure to file the required FCC Form 489 until March 21, 1991, constitutes willful and repeated conduct within the terms of the statute.

5. Pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), the base forfeiture amount for failing to file required forms is $30,000.00. Consistent with the *Policy Statement*, we are adjusting downward the forfeiture to $6,000.00 because the failure to file an FCC Form 489 is a relatively minor violation and because PagePrompt voluntarily disclosed its failure to file the FCC Form 489.

6. Accordingly, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that PagePrompt USA IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000.00) for willful and repeated violations of the aforementioned rule provision to and including March 21, 1991.

7. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order to: Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 30, 1991

COMMENTS INVITED ON OHIO PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Ohio (Region 33).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **October 9, 1991** and reply comments on or before **October 24, 1991.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 91-258 Ohio-Public Safety Region 33.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure	**Phase I** **CC Docket No. 78-72**
Transport Rate Structure and Pricing	**CC Docket No. 91-213**

ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 1, 1991; Released: August 30, 1991

Comment Date: October 29, 1991
Reply Comment Date: November 28, 1991
Comments and replies are to be filed in CC Docket No. 91-213.

By the Commission: Commissioner Barrett issuing a separate statement

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I. INTRODUCTION

1. In this Order and Further Notice of Proposed Rulemaking, we require local exchange carriers (LECs) to continue their current rate structure for transport, pending further agency action. We also institute further proceedings on transport rate structure and pricing issues.[1] In particular, we adopt a set of goals to be used in evaluating transport issues, propose a new transport rate structure, and seek comment on various transport pricing options under that rate structure.

II. BACKGROUND

2. The LECs carry interstate switched traffic from their end offices to interexchange carrier (IXC) networks through facilities dedicated exclusively to the use of one IXC, or though a combination of dedicated facilities and facilities used in common by several IXCs.[2] Pursuant to the Part 69 rules adopted in the *Access Charge Order*,[3] the LECs were required to allocate transport costs between separate rate elements for "dedicated" and "common" transport.[4] Finding that dedicated transport facilities possessed non-traffic-sensitive cost characteristics, the Commission prescribed a flat, per-line rate structure for the dedicated transport element. The Commission required as well that dedicated transport charges be distance sensitive.[5] The Commission also found that common transport costs were usage and distance sensitive, and therefore prescribed a rate structure that reflected both of these factors.[6]

3. In 1982, the United States District Court for the District of Columbia adopted the Modification of Final Judgment (MFJ) in *United States v. AT&T*,[7] which required that until September 1, 1991:

> charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area,... shall be equal, per unit of traffic delivered or received, for all interexchange carriers[.][8]

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[1] With this Order, we are terminating CC Docket No. 78-72. All outstanding issues in the dual-captioned CC Docket Nos. 78-72 and 80-286 will be resolved in CC Docket 80-286, and any additional filings relating to those issues should be filed in that docket. Comments filed in response to this Further Notice of Proposed Rulemaking should be filed in CC Docket No. 91-213.

[2] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 FCC 2d 241,309, para. 230 (1983) (*Access Charge Order*), *mod'd on recon.*, 97 FCC 2d 682 (1983), *mod'd on further recon.*, 97 FCC 2d 834 (1984) (*Second Reconsideration Order*), *aff'd in principal part and remanded in part*, National Association of Regulatory Utility Commissioners v. FCC,737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *mod'd on further recon.*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *aff'd on further recon.*, 102 FCC 2d 849 (1985). *See* Appendix A for a chart depicting common and dedicated transport service.

[3] *Id.*

[4] *Access Charge Order*, 93 FCC 2d at 309-313, paras. 230-241.

[5] *Id.* at 312, para. 238; *see also* 47 C.F.R. § 69.112.

[6] *Access Charge Order*, 93 FCC 2d at 313, para. 242. *See also* 47 C.F.R. § 69.111.

[7] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[8] MFJ, Appendix B at para. B(3).

On March 17, 1983, AT&T and the Bell Operating Companies (BOCs) filed a petition requesting that the Commission waive the Part 69 common/dedicated transport rules to the extent that the rules conflicted with the MFJ "equal charge" requirement.[9] The Commission waived the Part 69 transport rules, permitting the LECs to tariff transport charges that reflect a rate structure that differs from the Part 69 requirements.[10] While the MFJ provision applies only to the BOCs, the Commission waiver of the Part 69 rules permitted other LECs to adopt an "equal charge" rate structure for transport, and virtually all, if not all, have done so.

4. On December 28, 1984, the Commission issued a Notice of Proposed Rulemaking to re-examine issues related to the transport waiver and other matters. [11] The Notice invited comment on whether the Commission should extend, modify, or restrict in scope its waiver of the transport rules, and whether the Commission should impose cost-based pricing requirements for dedicated and common transport prior to the expiration of the MFJ's "equal charge" rule.[12] The Common Carrier Bureau subsequently issued a Request for Information to Supplement the Record on January 14, 1991, [13] inviting comment on competitive, technological, and regulatory developments in the telecommunications industry since adoption of the 1984 Notice that might affect the Commission's analysis and resolution of the transport issues. [14]

III. SUMMARY OF THE RECORD

5. In response to the Request for Information, the Commission received comments from numerous IXCs, LECs, and other interested parties. There is general agreement in the comments that small and medium size IXCs would have substantially higher transport costs if the Commission implemented the Part 69 rules as adopted in the 1983 *Access Charge Order*, whereas AT&T would see its transport costs decrease significantly. [15] Parties disagree, however, about how transport rates should be structured when the MFJ's "equal charge" requirement expires. Some parties, mostly IXCs other than AT&T, argue that the Commission should require "equal charges" indefinitely, or at least for an interim period pending further study of transport issues. In urging retention of the "equal charge" structure, they emphasize the adverse effects of the Part 69 pricing structure on interexchange competition. [16] Certain AT&T competitors also argue that the trunking facilities used by common transport should be as efficient as those used for dedicated transport.[17] US Sprint specifically contends that the Part 69 rate structure for transport "cannot be viewed as more cost-based than the equal charge rule."[18] In addition, US Sprint questions the benefits of expanded interconnection for switched access competition in light of its potential effect on interexchange competition.[19]

6. Others, including several of the BOCs, however, argue that there are legitimate cost differences between common and dedicated transport.[20] They also state that the equal charge rate structure for transport gives the IXCs little or no incentive to use LEC trunking facilities efficiently since the rates that IXCs pay under the MFJ requirement do not reflect LEC costs.[21] AT&T states that the waiver of the Part 69 rules contravenes the Commission's long-standing policy that services should be priced in a manner that reflects costs, and claims that under the "equal charge" rule, dedicated transport users such as AT&T bear a disproportionate share of local transport costs, whereas common transport users do not bear their

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[9] *See* American Telephone and Telegraph Company, Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations, 94 FCC 2d 545,547, para. 4 (1983).

[10] *Id.* (waiver set to expire on December 31, 1984); *Reconsideration Order*, 97 FCC 2d at 862, para. 88 (waiver extended through May 31, 1985); MTS and WATS Market Structure, Memorandum Opinion and Order, CC Docket No. 78-72, Phase I, FCC 85-87, 50 Fed. Reg. 9633, para. 7 (1985) (waiver extended until further notice).

[11] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Notice of Proposed Rulemaking, FCC 84-604, 49 Fed. Reg. 50,413, para. 13 (1984).

[12] *Id.*

[13] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Request for Information to Supplement the Record, 6 FCC Rcd 594 (1991).

[14] In response to the Bureau's request, 29 parties filed comments and 34 parties filed reply comments. A list of these parties is contained in Appendix B.

[15] For example, NYNEX and AT&T each estimate that AT&T's transport costs will decrease 13-14%, or by approximately $400 million, under the Part 69 rules. NYNEX Comments at Exhibit B, page 2; AT&T Reply Comments at 6. Sprint estimates that AT&T's total costs for switched services could fall by 6%, or $376 million. Sprint Comments at 11-12, n. 16. Sprint also estimates that its total operating costs for switched services could increase 10%, or by $267 million, under the Part 69 rules. Sprint Comments at 11-12, n. 16. NYNEX estimates that transport costs for medium and smaller carriers will increase by 26% and 4, respectively. NYNEX Comments at Exhibit B, page 2. AT&T estimates that under the Part 69 rules, medium size carriers' total switched access costs would be 15% higher than AT&T's, and that smaller carriers would have switched access costs 26% higher than AT&T's. *Ex Parte* Letter from Paul Malandrakis, Division Manager, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, dated June 12, 1991.

[16] CompTel Comments at 4-6; Sprint Comments at 2; MCI Comments at 8-9; Allnet Comments at 5; WTG Comments at 2; INAD Comments at 3; Elkhart Comments at 2-4; NYCOM Reply Comments at 1; ACTA Reply Comments at 1; ICA Reply Comments at 2; and CNS Reply Comments at 4.

[17] CompTel Comments at 19; Sprint Reply Comments at 18-19. US Sprint argues that the current equal charge rate structure does not necessarily result in overtrunking. Sprint Comments at 19-20.

[18] Sprint Reply Comments at 15-19. For example, US Sprint argues that the Part 69 rate structure fails to recognize properly the use of tandem routed transport for busy hour overflow from dedicated facilities. Sprint Reply Comments at 16.

[19] Sprint Reply Comments at 23-27.

[20] NYNEX states that, under the Part 69 rules, the use of the tandem adds approximately .5 to .6 cents per minute to the common transport rate. NYNEX Comments at 40. Tandem-routed transport also uses additional circuit equipment not required by directly-routed transport.

[21] For instance, Ameritech asserts that as much as 59% of its tandem trunks in service in some areas may not be necessary to support network usage. According to Ameritech, IXCs order these trunks because the rates they pay do not reflect the fixed costs of the facilities. Ameritech Comments at 16-17. NYNEX also states that it utilizes about 31% more direct-routed transport trunks and about 32% more tandem-routed transport trunks than necessary. NYNEX Reply Comments at 17, n. 39.

fair share.[22] The BOCs, as well as AT&T, advocate pricing that more nearly reflects costs, either pursuant to the existing Part 69 rules or other mechanisms. [23] Ameritech states that cost-based pricing for transport will encourage IXCs to order LEC facilities in an economically efficient manner and to locate their points of presence near LEC end offices. [24] Furthermore, several LECs urge the Commission to delay action in the *Expanded Interconnection* proceeding until resolution of the issues in this proceeding. [25]

7. A number of commenters make specific proposals for new transport rate structures. [26] Many commenters advocate that the Commission adopt, or at least seriously consider, an interim transport rate structure consisting of a flat dedicated transport charge, a usage-sensitive common transport charge, and a residual usage-sensitive charge. [27] A number of parties also urge the Commission to collect additional information through further proceedings before adopting any specific proposal. [28] Some of those parties assert that fundamental changes in the marketplace, such as the introduction of exchange access competition and new developments in technology, require a thorough reevaluation of the transport rules on a more complete and current record than that presently before the Commission. A number of parties also advocate consideration of broader separations and access rate structure issues.[29]

IV. DISCUSSION

A. Commission Goals

8. We conclude that our decision on the structure and pricing of transport must carefully balance three potentially conflicting objectives. These include promoting efficient use of transport facilities by allowing or requiring the LECs to price in a manner that best reflects the way costs are incurred, adopting transport rules conducive to full and fair interexchange competition, and avoiding the adoption of transport rules that would interfere with the development of interstate switched access competition.[30]

9. Any transport rate structure that we adopt should promote efficient use of the network. As the Commission has previously recognized, removing artificial barriers to cost-based pricing serves to promote efficiency and thereby maximize consumer welfare. [31]

10. We should also adopt transport rules conducive to full and fair interexchange competition among all IXCs. Transport represents a significant portion of the IXCs' total operating costs.[32] Most of the commenters agree that the small and medium size IXCs would face significantly greater transport costs if the existing Part 69 rules were implemented upon expiration of the MFJ's "equal charge" requirement. Thus, in weighing changes to the current transport rate structure, we must be sensitive to the implications for interexchange competition of any sudden and substantial increases in the transport costs of small and medium size IXCs.

11. Our final goal in this proceeding is to avoid adopting transport pricing requirements that would interfere with the development of interstate access competition. The LECs currently face emerging competitive alternatives to their interstate switched access services,[33] and the Commission recently issued a Notice of Inquiry requesting comment on expanded interconnection for the provision of interstate switched transport service.[34] We will, of course, carefully consider all of the implications of switched transport competition in making a decision in that proceeding. We should not, however, promulgate

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[22] AT&T Comments at 2-6, 8-10.

[23] Pacific Comments at 4; Ameritech Comments at 6-19; Bell Atlantic Comments at 1-2; U S West Comments at 14-16; AT&T Comments at 2-4; and Ad Hoc Reply Comments at 4.

[24] Ameritech Comments at 18-19.

[25] SWBT Comments at 13; Ameritech Comments at 2-3.

[26] GTE Comments at 16-20; NYNEX Comments at 43-46; U S West Comments at 17-22; Ameritech Comments at Exhibit 5; and USTA Reply Comments at 6-9, 1317.

[27] Ameritech Comments at Exhibit 5; NYNEX Comments at 43-45; CompTel Reply Comments at 33; MCI Reply Comments at 8; MFS Reply Comments at 9; NECA Reply Comments at 2-3; and Rochester Reply Comments at 3.

[28] GTE Comments at 15; Rochester Comments at 4-5; U S West Comments at 11; Pacific Comments at 2-3; SWBT Comments at 12; MFS Comments at 4; WTG Comments at 5-6; NECA Comments at 6; NTCA Comments at 3; Metromedia Comments at 1; MCI Comments at 1-2; 4-5; MCI Reply Comments at 2-3; Ad Hoc Reply Comments at 2, 4; and NYCOM Reply Comments at 1.

[29] GTE Comments at 15; Rochester Comments at 4-5; Metromedia Comments at 1; MCI Comments at 1; NTCA Comments at 3-4; WTG Comments at 5-6; MCI Reply Comments at 2-3; Ad Hoc Reply Comments at 1-2; NYCOM Reply Comments at 1; and US Sprint Reply Comments at 28-32.

[30] These goals represent a recasting of our more broadly stated goals in the MTS and WATS Market Structure proceeding, 97 FCC 2d 682 at 683 (1983), to reflect the issues in this proceeding as well as our increased awareness of the potential benefits of access competition. *See, e.g.,* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 91-159, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection Notice).*

[31] *Access Charge Order,* 93 FCC 2d at 401-402. To improve carrier incentives for efficiency and innovation, price cap regulation establishes a benchmark of how carrier costs change, inviting carriers to beat the cost benchmark. Thus, price cap regulation changes the nature of our consideration of costs in connection with LEC rates. It remains important, however, that we avoid imposing regulatory requirements that force LECs to price services uneconomically.

[32] The record in this proceeding indicates that local transport costs account for approximately 20% of an IXC's total operating expenses for switched services. NYNEX Comments at 29, n. 29; Sprint Comments at 9.

[33] For example, many large users of interstate switched services, especially those in metropolitan areas, can connect their premises directly to IXC Points-of-Presence by purchasing or leasing from non-LEC providers dedicated facilities totally separate from the LEC networks. *See, e.g.,* Fiber Deployment Update, Jonathan M. Kraushaar, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 1990, at 28-36.

[34] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 91-159, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection Notice).*

transport rules that would reduce the Commission's flexibility by effectively precluding adoption of expanded interconnection for the provision of transport. [35]

B. Maintaining the Status Quo

12. As previously stated, the MFJ "equal charge" requirement expires on September 1, 1991. Rather than permitting the LECs to implement the original Part 69 rules or other transport rate structures, we are requiring that all LECs maintain their current rate structure for transport service, pending further action. [36] A number of the commenting parties support temporary retention of the current rate structure for transport.[37] The record filed in response to our Request for Information indicates that further study is necessary before we determine the proper rate structure for transport. By retaining the "equal charge" rate structure during our review of the record which will be submitted in response to our proposal here, we ensure that small and medium IXCs will not be adversely affected come September 1, 1991, by unnecessary churn in rate structures and rate levels during the pendency of this proceeding. Maintaining the status quo also avoids imposing potentially unnecessary burdens on the LECs, whose billing and administrative systems are not currently designed to record and bill for different kinds of transport offerings.[38]

13. We recognize that retaining the "equal charge" rate structure pending further Commission action may not promote the most efficient use of the public switched network to the extent that it prevents the LECs from pricing transport in a way that best reflects the manner in which costs are incurred. It also retains a pricing structure that could interfere with the growth of interstate access competition through expanded interconnection for transport. We conclude, however, that the importance and complexity of transport issues, the potential for harm to small and medium IXCs from precipitous action, [39] and the administrative burdens associated with any change justify retention of the "equal charge" rate structure, pending further study of transport pricing.

C. Proposal

14. Although we maintain the status quo despite expiration of the MFJ equal charge requirement on September 1, 1991, we tentatively conclude that the record supports a future change in the transport rate structure. Many of the comments indicate that application of the current Part 36 and Part 69 rules could produce common and dedicated transport rates that would have undesirable effects. Parties also question the extent to which the current Part 69 rules reflect true economic costs. [40] We therefore propose to adopt a new rate structure for LEC transport, consisting of a flat-rate dedicated transport charge, a usage-based common transport charge, and a usage-based interconnection charge described in more detail below. We tentatively conclude that this new rate structure for transport reflects cost causation and efficiency concerns to a greater extent than the current structure. It should also reduce regulatory barriers to expanded competition in the provision of transport. At the same time, this rate structure would reduce the potential for adverse effects of changes in transport pricing on interexchange competition. As discussed below, we also seek comment on the extent to which transport rates should be distance sensitive. [41] Finally, we seek comment on various options for setting the initial rate levels for these charges, and propose to rely largely on existing price cap rules to govern subsequent transport rate revisions by subject LECs. We also seek comment on standards to govern future transport rate revisions by rate of return LECs.

1. Rate Structure

15. A number of the parties filing in response to our request for supplemental comments advocate that the Commission adopt, or at least seriously consider, a new transport rate structure consisting of three charges. [42] For example, NYNEX, Ameritech, and GTE propose transport rate structures that consist of common and dedicated rates that would produce lower total revenues than rates based on the Part 69 rules, and include a new residual rate element.[43] Such a residual element would be paid by competing access providers interconnecting with the LEC switched access network, as well as LEC access customers.[44] Medium and small IXC parties, such as

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[35] In our recently initiated inquiry, we recognized the interrelationship of transport pricing issues and the adoption of expanded interconnection for transport. In particular, we noted that the Competitive Access Providers (CAPs) will presumably charge flat-rate, cost-based rates for their transport services that could be more attractive to high volume users of interstate access than the usage-based LEC charges. *Expanded Interconnection Notice*, 6 FCC Rcd at 3270, para. 74. Thus, we stated that "consideration of possible LEC responses to CAP flat-rate pricing of switched transport appears to be appropriate if expanded switched transport interconnections are to be permitted." *Id.*

[36] This requirement applies regardless of the rate structure the LEC currently uses. We believe that the reasons for maintaining the status quo in the case of LECs currently using an "equal charge" rate structure apply equally to any LECs that currently use rate structures that differ somewhat from this model. We also note that this requirement includes retention of currently effective tariff provisions that implement the "five mile rule," determining the mileage for which AT&T's competitors are billed. Our action here supercedes our waiver of the Part 69 transport rules. *See* note 10, *supra*.

[37] Rochester Comments at 4-5; Metromedia Comments at 1; MCI Comments at 1; US West Comments at 11; and NYCOM Reply Comments at 1.

[38] USTA Comments at 10-12; U S West Comments at 12-13; GTE Comments at 20-21; BellSouth Reply Comments at 10-11; NYNEX Reply Comments at 13; and SWBT Reply Comments at 5.

[39] *See* notes 15 and 16 *supra*.

[40] Allnet Comments at 6; Allnet Reply Comments at 6-8; ATC Reply Comments at 3; Ameritech Comments at 21-23; NYNEX Comments at 42-45.

[41] We also plan to issue a Supplemental Notice in the Expanded Interconnection proceeding seeking comment on the proper degree of distance sensitivity in the rates for special access.

[42] *See, e.g.*, CompTel Reply Comments at 33; NECA Reply Comments at 3; and Rochester Reply Comments at 3-4.

[43] *See* note 27 *supra*.

[44] NYNEX Comments at 43-46; Ameritech Reply Comments at 5-8; GTE Reply Comments at 12-13.

CompTel, express support for this type of plan.[45] MFS, a competitive access provider, also expresses general approval for the concept of a new residual charge if such a charge is implemented on a transitional basis. [46]

16. We tentatively conclude that we should adopt such a three-part transport rate structure. The first element, dedicated transport, would be priced on a flat-rate basis and apply to the use of transport facilities dedicated to the use of a single IXC. The second rate element, common transport, would be priced on a per-minute basis and apply to the use of transport facilities used by multiple IXCs. The third rate element would be a residual interconnection charge, priced on a per-minute basis. Under this proposal, the interconnection charge in LEC tariffs would apply to all LEC switched access customers and all parties (CAPS) interconnecting with the LEC access network pursuant to provisions for expanded interconnection for the provision of switched services.[47]

17. We tentatively conclude that the proposed rate structure more fully reflects our goals in this proceeding than the current structure. Since this proposal contains a flat-rate charge for dedicated transport, and a per-minute rate for common transport, it would represent a step in the direction of enabling prices to reflect the manner in which underlying costs apparently are incurred, with its attendant efficiency benefits. At the same time, use of a per-minute interconnection charge would enable this Commission to take into account any historical overassignment of costs and to limit any unnecessary adverse effects on small and medium IXCs of transport changes.

18. The proposed rate structure also would appear to leave us the option of adopting expanded interconnection for transport at some point in the future. The current equal charge structure could have the effect of impairing the development of full and fair competition in the provision of dedicated transport through expanded interconnection. Under this structure, the LECs would be required by regulation to price dedicated transport links on a per-minute basis, while parties interconnecting with the LEC switched access network pursuant to expanded interconnection would be able to price their competitive dedicated transport links on a flat-rate basis. [48] Under the proposed rate structure, by contrast, any regulatory requirement for LEC usage-sensitive pricing applicable to dedicated transport traffic through the interconnection charge would apply to dedicated transport traffic carried by the CAPs and other interconnecting parties as well.[49] In all likelihood, the CAPs would pass a per-minute interconnection charge on to their dedicated transport customers in the form of a usage-sensitive charge, although in certain circumstances the CAPs may choose a different rate structure.[50]

19. We invite interested parties to discuss the merits of this possible rate structure in light of our goals in this proceeding. We also welcome comment on alternatives to the proposed rate structure. Parties supporting alternative transport pricing structures should explain their proposals fully in their initial comments in order to allow other parties to comment on these plans in their replies. Such parties should also explain how their proposals satisfy our goals in this proceeding.

20. In addition, we seek comment on the extent to which these proposed rate elements should be distance sensitive. The 1983 *Access Charge Order* found that transport costs were distance sensitive and therefore prescribed distance charges. The current rules do not, however, prescribe any formula to determine the degree of distance sensitivity in transport rates. CompTel specifically challenges this aspect of the current transport rate structure, asserting that the cost of the fiber optic facilities now commonly used to provide transport is largely distance insensitive,[51] and that the extent of distance sensitivity reflected in LEC rates varies widely from service to service and from LEC to LEC with no apparent justification.[52] CompTel argues that the distance sensitivity reflected in LEC transport rates seriously disadvantages smaller IXCs since they have fewer points of presence for interconnection with the LECs than AT&T. [53] A number of the BOCs have challenged CompTel's analysis of distance sensitivity issues, alleging that CompTel has committed serious methodological errors as well as overstated the amount of fiber and digital equipment currently employed in the network.[54] The questions raised by CompTel merit careful consideration. [55] Accordingly, we invite in-

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[45] CompTel Reply Comments at 31-33.

[46] MFS Reply Comments at 9-11.

[47] Under the proposals here and the structure described in the *Expanded Interconnection* proceeding for transport, parties interconnecting with the LEC network pursuant to provisions for expanded interconnection for switched services would pay the connection charge, which would recover costs associated with LEC facilities used in the provision of expanded interconnection service, as well as the interconnection charge proposed in this proceeding. Entities providing interstate access services or facilities that can be substituted for LEC switched access offerings, but that do not interconnect with the LECs' switched access networks, would not pay the interconnection charge.

[48] For purposes of this discussion, we assume that the CAPs that are classified as common carriers would qualify for treatment as non-dominant.

[49] The interconnection charge should apply to interconnecting parties as well as to the LECs' customers insofar as this charge is designed to reduce any unnecessary adverse effects on small and medium IXCs resulting from changes in transport rates, is intended as an interim measure to avoid dislocations as a result of possible historic overassignments of costs to the transport category, or is meant to provide assistance to high cost areas.

[50] *See* note 48, *supra*.

[51] CompTel Comments at 31, n. 46; *see also* CompTel's Petition to Reject or, in the Alternative, to Suspend and Investigate, filed May 14, 1991 in 1991 Local Exchange Carrier Annual Access Tariff Filings, at 5-6.

[52] CompTel Comments at 28-31, 38; *see also* CompTel's Petition to Reject or, in the Alternative, to Suspend and Investigate, filed May 14, 1991 in 1991 Local Exchange Carrier Annual Access Tariff Filings, at 5-6.

[53] CompTel Comments at 31-34.

[54] *See, e.g.,* NYNEX Reply Comments at Appendix G, pages 2-5, 1991 Annual Access Tariff Filings, NYNEX Telephone Companies Tariff FCC No. 1, Transmittal No. 24, May 23, 1991; Bell Atlantic Reply Comments at Appendix A, Item 7, 1991 Annual Access Tariff Filings, Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal Nos. 425 and 436, May 23, 1991.

[55] Although CompTel initially raised the issue of distance sensitivity in the Commission's Competition in the Interexchange Marketplace proceeding, *see,* CompTel's comments filed in CC Docket No. 91-132 at 42-58 and Appendix E,

terested parties to comment on the issue of distance sensitivity in the transport rate structure and propose appropriate Commission action. [56]

2. Rate Levels

a. Initial Rates

21. We set forth below various alternatives for setting the initial rates for common and dedicated transport, as well as the interconnection charge, for both price cap and rate of return LECs. In the *LEC Price Cap Order*, the Commission stated that "[p]ricing issues related to other services that require fundamental changes in the access charge structure will be resolved in appropriate proceedings as they arise."[57] Thus, the Commission recognized that the rates for tariff elements instituted in conjunction with certain fundamental changes in the existing rate structure might require scrutiny beyond that provided for in the price cap rules. Given the importance of the rate levels for each of these rate elements to achievement of our goals, we tentatively conclude that the proposed changes in the current transport rate structure fall into this narrow category of fundamental changes warranting special scrutiny. [58] We propose to adopt specific pricing requirements for the initial restructured transport filings, rather than granting LECs the degree of flexibility generally permitted under the price cap rules[59] for restructured services.[60] We must also consider the pricing requirements applicable to rate of return LECs. Accordingly, we seek comment on a variety of options for setting the initial rates for dedicated and common transport for both price cap and rate of return LECs. We make separate proposals to govern the interconnection charge for price cap and rate of return LECs.

(1) Dedicated Transport Rate Levels

22. A number of options exist for setting the initial rate levels for dedicated transport. For example, rates for dedicated transport could be set as specified in the Part 69 rules. Alternatively, the LECs could be allowed to price dedicated transport at the same rates as special access, establishing separate rates for single voice grade circuits, DS1 service, and DS3 service. [61] A number of LECs have endorsed pricing dedicated transport to achieve parity with special access charges. Those LECs argue that dedicated transport uses the same facilities as special access and should be subject to the same rates, and that the Part 36 and Part 69 cost allocation rules allocate excessive costs to the transport category as a whole or to dedicated transport in particular. [62] Setting dedicated transport rates at some level between the current special access rates and the rates under Part 69 is another option. For example, the LECs could be allowed to reflect the special access rates for DS1 service, but not DS3 service, in their transport tariffs. Initial rates for dedicated transport also could be set pursuant to the requirements for new service pricing under price cap regulation. [63]

23. The rates established for LEC dedicated transport offerings will affect the extent to which the Commission's goals are achieved. The rates will significantly affect the development of competition between the LECs and other providers of access services. In addition, the relation of dedicated transport rates to underlying costs will affect network efficiency. Furthermore, dedicated transport rate levels could affect interexchange competition. For example, use of DS1 and DS3 special access rates for dedicated transport would tend to reduce access costs for the IXCs with sufficient volume to justify use of these higher capacity offerings, allowing them to take advantage of the cost efficiencies resulting from high traffic volumes, while adversely affecting those IXCs with lower traffic volumes.

24. We seek comment on these and other options for setting initial dedicated transport rates for both price cap and rate of return LECs in light of our goals in this proceeding. We also seek comment on whether we should amend any particular Part 69 cost allocation rules or

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that proceeding does not specifically deal with access charges. Therefore, we are addressing the issue of distance sensitivity in this proceeding and in the Expanded Interconnection proceeding, which deal with special and switched access.

[56] *See* note 41 *supra*.

[57] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6835, para. 395 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *mod'd on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed*, District of Columbia Public Service Comm'n v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[58] We emphasize that the category of rate restructures justifying special scrutiny is extremely limited, and that our proposed use of supplemental safeguards in special circumstances such as those presently before us is not intended to undermine our current price cap treatment of routine tariff restructures. We continue to believe that, absent circumstances such as those present in this case, our present price cap tariff requirements provide substantial benefits to LEC customers.

[59] We also tentatively conclude not to adopt an approach of virtually unlimited LEC flexibility in pricing under this rate structure. *See* USTA Reply Comments at 6-15.

[60] We view our proposal as a service restructure under *Price Cap* regulation since the revised rate structure would replace the current offering of direct or tandem-routed transport at equal per-minute rates.

[61] A high volume customer using DS1 or DS3 service will have lower per voice grade circuit costs than would be the case if the customer had ordered individual voice grade circuits. This is due to the fact that a DS1 channel is equivalent to 24 voice grade circuits, but the LEC rates for DS1 special access channels are not 24 times the rate for a single voice grade channel. The same is true of the rates for DS3 channels, which are equivalent to 28 DS1s.

[62] Ameritech Comments at 21-23; NYNEX Comments at 43-46.

[63] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 and 87-313, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, FCC 91-186 (released July 11, 1991)(*Part 69/ONA Order)* at paras. 40-45. In that Order, the Commission adopted "a flexible cost-based approach to pricing new services." *Id.* at para. 38. We believe that this option should be considered even though our proposal would constitute a service restructure under the existing *Price Cap* rules.

should refer any specific separations issues to a Federal/State Joint Board. Commenters supporting an alternative means of setting the initial rates for dedicated transport should present their proposals in their initial comments and discuss them in light of the goals set forth above.

(2) Common Transport Rate Levels

25. A number of options also exist for setting the initial rates for common transport. LECs could, for instance, justify common transport rates by making the cost showings required for new services under price cap regulation.[64] Alternatively, LECs could set rates at the levels established by the Commission's original Part 69 rules. Permitting the LECs to implement a form of cost-based pricing for common transport would foster efficiency. The record indicates, however, that use of the Part 69 rules to set initial common transport rates would result in substantially higher access costs for small and medium IXCs to the extent they rely heavily on common transport. In addition, several commenters suggest that the Part 36 separations process and/or the Part 69 rules allocate excessive costs to the transport category as a whole, or to common transport in particular. For example, a number of parties argue that the costs associated with tandem switches should not be assigned to the common transport rate element.[65]

26. In light of these considerations, common transport rates alternatively could be set, at least initially, at their current levels or in some relation to the per-minute cost of dedicated transport.[66] For instance, the rate for common transport could be set to approximate the per-minute cost of dedicated transport. This approach would minimize the effects on small and medium size IXCs using common transport, but would not permit the LECs to reflect in their rates the apparent differences in the costs of providing common and dedicated transport. It would also be possible to establish a common transport rate that approximates the per-minute cost of dedicated transport plus some additional amount to reflect some or all of any cost differences between dedicated and common transport. A system of peak/off peak pricing or some form of capacity charge could also be used to reflect busy hour use of common transport to carry overflow traffic from dedicated transport circuits.

27. We invite interested parties to comment on these options for setting the initial rates for common transport for both price cap and rate of return LECs in light of the goals noted above. We also seek comment on whether we should amend any particular Part 69 cost allocation rules or should refer any specific separations issues to a Federal/State Joint Board. Parties presenting other pricing mechanisms should include them in their initial comments, and discuss them in terms of our goals.

(3) Interconnection Charge Rate Levels

28. Assuming that the dedicated and common transport rates selected will not recover as much revenue as the current transport charges, it will be necessary to establish a mechanism to enable the LECs to recover the shortfall. The lower the rates for common and dedicated transport, the higher the interconnection charge. Accordingly, in evaluating proposals for setting initial common and dedicated transport rates, commenters should, in their initial comments, address the effects of those rates on the interconnection charge, and the resulting implications for achieving the Commission's goals.

29. Under price cap regulation, the rates for a restructured service take the place of the rates for the previous service, and must comply with the applicable price cap and service bands.[67] Although we tentatively conclude that we should adopt additional pricing requirements for the initial rate levels for dedicated and common transport, we believe that the residual interconnection charge need only comply with the price cap rate restructure requirements. Since the interconnection charge would be residual, its level would depend on how rates for the other two elements are set. For rate of return LECs, the interconnection charge would be computed by subtracting projected dedicated and common transport revenues from a revenue requirement computed in accordance with the Part 69 rules. This residual revenue requirement would be divided by the relevant projected total minutes.[68]

b. Subsequent Rate Revisions

30. Although requirements supplementing the price cap rules for the initial pricing of restructured transport services appear necessary and appropriate, we tentatively conclude that subsequent rate revisions should be governed by a modified set of price cap rules. This section contains our proposal for applying price cap regulation to later transport rate changes. We also seek comment on measures to govern subsequent changes in the transport rates of rate of return LECs.

31. Under the price cap rules, transport is a service category in the traffic sensitive basket, along with local switching and information. Each of these three service categories is subject to a separate price band that allows the LEC to move prices in the service category up or down five percent each year, after adjusting for changes in the price cap index. [69]

32. The first issue is whether transport as a whole should remain one service category subject to the banding requirements, or whether it should be divided into three service categories which are individually subject to banding requirements. The first option would provide the LECs with very substantial flexibility in making rate changes: for streamlined regulatory treatment, the LECs would need only to make sure that the combination of transport price changes fell within the five percent bands.

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[64] *Id.*

[65] Rochester Comments at 8; CompTel Reply Comments at 30-31.

[66] A per-minute cost for dedicated transport would be calculated by dividing the charge for a dedicated transport channel by an estimate of the average monthly traffic volume.

[67] *See* 47 C.F.R. §§ 61.46(c), 61.47(d).

[68] We ask the seven BOCs and GTE to prepare estimates of rates for each of the transport elements under various alternatives. We note that NYNEX and Ameritech have already devoted substantial resources to this endeavor. We direct the BOCs and GTE to work together and with the Common Carrier Bureau in developing the methodologies for the preparation of these estimates and the pricing alternatives to be examined.

[69] *LEC Price Cap Order*, 5 FCC Rcd at 6810-6814, paras. 191-226.

Given the importance of the rate levels for the three transport categories to achievement of our basic goals in this proceeding, we tentatively conclude that greater restraint on LEC ability to make price changes is necessary and therefore propose to treat common transport, dedicated transport, and the interconnection access element as separate service categories for purposes of the price cap rules.

33. For the dedicated transport and common transport service categories, we propose to apply the general banding requirements set forth in the price cap rules. This would allow increases and decreases on a streamlined basis of up to five percent annually in the rates for both common and dedicated transport when adjusted for changes in the price cap. The LECs could reduce the rates for these two elements further by making an average variable cost showing, although their ability to recover the lost revenue would be limited. Assuming that the initial rates are set at appropriate levels, we tentatively conclude that this would allow the LECs some pricing flexibility while significantly limiting the potential increases in the rates for other services.

34. We do not, however, propose to allow streamlined price cap review for increases in the interconnection charge over and above any increase permitted by the price cap index for the traffic sensitive basket. We believe that this is appropriate in light of the nature of the interconnection charge and the fact that we propose to apply all or a portion of this charge to any party that interconnects with the LEC switched access network. Absent this constraint, the LECs would be able, under price cap regulation, to reduce their rates for dedicated transport and increase the interconnection charge paid by their competitors as well as their own customers by up to five percent above changes in the price cap. We believe that such pricing flexibility is undesirable under the unique circumstances presented by the interconnection charge. We also seek comment on other options for governing future changes in the interconnection charge. One such alternative would involve establishing a dollar ceiling on the revenue to be generated by the interconnection charge. We also ask interested parties toiscuss the desirability of specifying a schedule for reducing or phasing out the interconnection charge.

35. LECs remaining under rate of return regulation are, of course, not subject to the price cap rules for subsequent rate revisions. Instead, they would be subject to the currently applicable detailed requirements governing cost support and computation of access charges. To the extent that we set initial transport rates in a manner that does not reflect costs as defined by the current Part 69 rules, the current requirements for cost support applicable to rate of return carriers may not be appropriate for subsequent rate revisions. Accordingly, we seek comment on the requirements that should apply to changes in these carriers' transport charges. 36. We invite interested parties to comment on these proposals for subsequent transport rate changes in light of the Commission's overall goals in this proceeding. Parties setting forth alternative proposals for either greater or lesser limitations upon transport price changes should explain the proposal fully in their initial comments in order to allow other parties to comment on their proposals in their replies.

D. Longer-Term Issues

37. In response to our request for supplemental comments, several LECs and IXCs raise a number of longer-term questions related to transport in addition to urging interim changes in the transport rate structure. For instance, some parties suggest that the Commission undertake a comprehensive re-evaluation of jurisdictional separations and the access charge regime.[70] We recognize the importance of these broad, longer-term issues, and we have already begun exploring these matters. For instance, we are currently considering with the state commissioners on the Federal/State Joint Board the need to initiate a comprehensive re-examination of our jurisdictional separations rules. However, we are not, at this time, instituting the comprehensive review advocated by some parties. [71] In particular, we believe that review of transport rate structure and pricing issues cannot be postponed pending such a proceeding. Thus, we tentatively conclude, in light of our goals in this proceeding, that we can, and should, implement the transport rate structure proposed here before completing any such comprehensive re-evaluation.

V. PROCEDURAL MATTERS

A. Ex Parte

38. This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine period, provided they are disclosed as provided in Commission's rules. *See generally,* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

39. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate transport services directly subject to the proposed rule amendment do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure that the special circumstances of the smaller LECs are carefully considered in resolving these issues.[72] The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

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[70] *See* note 29 *supra.*

[71] We are, however, seeking comment on specific separations or Part 69 cost allocation rules that may overassign costs to the transport category as a whole or to common transport in particular. *See, e.g.,* para. 24 *supra.*

[72] *Access Charge Order,* 93 FCC 2d at 338-339 (1983).

C. Notice and Comment Provision

40. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before October 29, 1991, and reply comments on or before November 28, 1991. [73] To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting comments. Parties wanting each Commissioner to receive a personal copy of their comments must file an original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information regarding this Order and Further Notice of Proposed Rulemaking, contact Melissa Newman, (202) 632-9342, or Suzanne Tetreault, (202) 632-6363, both of the Common Carrier Bureau, Policy and Program Planning Division.

VI. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that local exchange carriers are required to maintain their current rate structure for transport, pending further agency action, and that Part 69 IS AMENDED to reflect this requirement as shown in Appendix C effective September 1, 1991. [74]

42. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed changes in the rate structure and pricing of transport. COMMENT IS INVITED on these proposals. [75]

43. IT IS FURTHER ORDERED that CC Docket No. 78-72 IS TERMINATED.[76]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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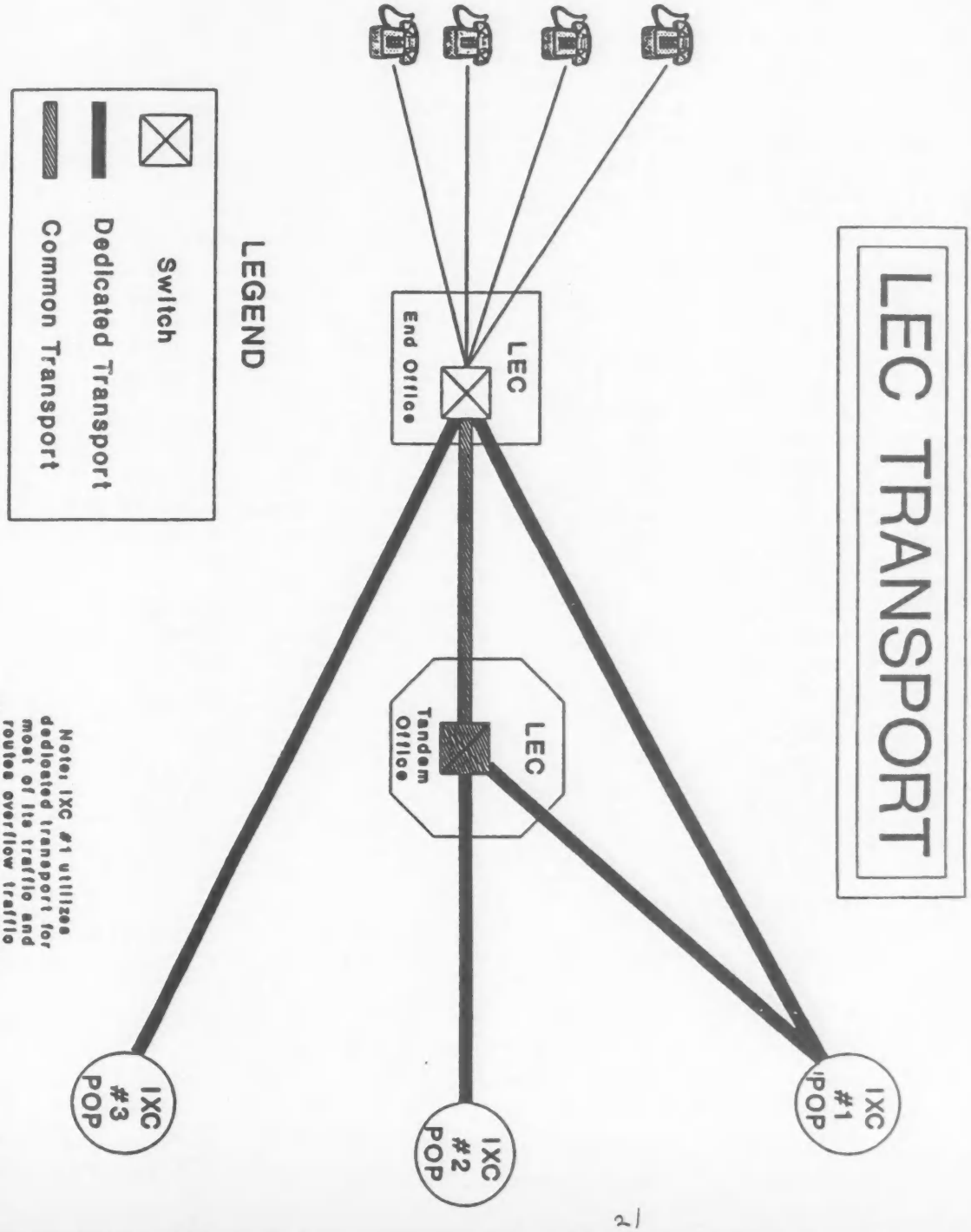
[73] Comments and replies are to be filed in CC Docket No. 91-213, Transport Rate Structure and Pricing.

[74] We find good cause to make this requirement effective on less than thirty days' notice in order to avoid any possibility of sudden, temporary changes in access rates. *See* 5 U.S.C. § 553(d)(3).

[75] These actions are taken pursuant to Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, 220, and 403.

[76] *See* note 1, *supra*.

Appendix A


LEC TRANSPORT
LEC
End Office
LEC
Tandem
Office
IXC
#1
POP
IXC
#2
POP
IXC
#3
POP
LEGEND
Switch
Dedicated Transport
Common Transport
Note: IXC #1 utilizes
dedicated transport for
most of its traffic and
routes overflow traffic
through the tandem switch.

APPENDIX B

COMMENTS FILED IN CC DOCKET NO. 78-72
February 22, 1991

Allnet Communication Services (Allnet)

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

People of California and of the Public Utilities Commission of the State of California (California PUC)

Competitive Telecommunications Association (CompTel)

Public Service Commission of the District of Columbia (DC PSC)

Elkhart Telephone Company (Elkhart)

GTE Service Corporation (GTE)

International Communications Association (ICA)

Iowa Network Access Division (INAD)

MCI Telecommunications Corporation (MCI)

Metromedia Communications Corporation (Metromedia)

Metropolitan Fiber Systems, Inc. (MFS)

NYNEX Telephone Companies (NYNEX)

National Exchange Carrier Association, Inc. (NECA)

National Telephone Cooperative Association (NTCA) NorLight

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Pacific Bell (Pacific)

Rochester Telephone Corporation (Rochester)

Southwestern Bell Telephone Company (SWBT)

Teleport Communications Group (Teleport)

US West Communications, Inc. (U S West)

US Sprint (Sprint)

United States Telephone Association (USTA)

United Telecommunications, Inc. (United)

Williams Telecommunications Group, Inc. (WTG)

REPLY COMMENTS FILED IN CC DOCKET NO. 78-72
March 22, 1991

Advanced Telecommunications Corporation (ATC)

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Allnet Communication Services, Inc. (Allnet)

American Telephone and Telegraph Company (AT&T)

America's Carriers Telecommunications Association (ACTA)

Ameritech Operating Companies (Ameritech)

Association for Local Telecommunications Service (ALTS)

Bay Area Teleport (Bay Area)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

Capital Network System, Inc. (CNS)

Cincinnati Bell Telephone (CBT)

Competitive Telecommunications Association (CompTel)

Consolidated Network, Inc. (CNI)

Florida Public Service Commission (Florida PSC)

GTE Service Corporation (GTE)

Illinois Commerce Commission (ICC)

International Communications Association (ICA)

MCI Telecommunications Corporation (MCI)

Metromedia Communications Corporation (Metromedia)

Metropolitan Fiber Systems, Inc. (MFS)

NYCOM Information Services, Inc. (NYCOM)

NYNEX Telephone Companies (NYNEX)

National Exchange Carrier Association (NECA)

New York State Department of Public Service (NY DPS)

Pacific Bell (Pacific)

Phone America of Carolina, Inc. (Phone America)

Rochester Telephone Corporation (Rochester)

Southern Pacific Telecommunications Company (Southern)

Southwestern Bell Telephone Company (SWBT)

Teleport Communications Group (Teleport)

US Sprint (Sprint)

United States Telephone Association (USTA)

Williams Telecommunications Group, Inc. (WTG)

APPENDIX C

AMENDMENTS TO CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Part 69 is amended as follows:

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended 47 U.S.C. 154, 202, 203, 205, 218, 403, unless otherwise noted.

2. Part 69 is amended by adding new Section 69.210:

69.210 Interim Transport Pricing

The transport rate structure in effect August 1, 1991, shall be retained pending further Commission action.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: MTS and WATS Market Structure (CC Docket No. 78-72, Phase I).

Throughout these proceedings on interexchange competition, I have made clear my views that the Commission must not be short-sighted. My goal has been to pave the way for competition throughout each level of the interexchange marketplace. Competition between AT&T, MCI and U.S. Sprint is fine. However, I desire to see other players competing for customers in this marketplace, as well. This proceeding has gone to the core of that competition from an economic standpoint. Entry into the interstate interexchange market can be either spurred or hindered depending upon the access rates charged by the local exchange carriers (LECs). I do not suggest that LECs should not be able to efficiently price transport in a manner that reflects the costs which are incurred. An unfair rate structure disadvantages not only the local exchange carriers and the interexchange carriers, but also the customers these companies serve. For this reason, I believe the action taken in this Order and Further Notice of Proposed Rulemaking is very important to ensuring an opportunity for full and fair competition. Our decision to maintain the status quo on the rate structure for transport and to seek comment on the appropriate transport rate structure and the various pricing options under this structure is an approach that seeks long term solutions.

I have made no secret of my desire to consider the impact of these issues on the smaller interexchange carriers and the resellers. These carriers often serve the smaller businesses in this country and provide service in rural areas. While I am convinced that there will be consolidation among these companies, I do not believe that Federal Communications Commission rules and policies should cause the premature demise of small and mid-size IXCs. Expiration of the *Modification of Final Judgment* 's provision requiring "equal per unit of traffic" charges, would adversely affect the small and medium size interexchange carriers. On the otherhand, maintenance of the equal charge requirement should not adversely affect any carriers. It will allow the Commission sufficient time to fully explore the issues through the notice and comment process. I would urge commenters to take advantage of this opportunity and to be specific in answering the many questions set forth in the Further Notice. I also would suggest that commenters provide economic data on the impact of the various rate structures and pricing schemes. Rate and pricing schemes that permit maximum competition will be of particular interest to me.

As the Comments are filed in this proceeding, I will examine them to ensure that the proposals are fair to *all* interexchange carriers. Finally, I also will be interested in the views of the competitive access providers on the impact of our proposals on our attempts to provide for expanded interconnection opportunities.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-116

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 2982

Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan No. 17

ORDER

Adopted: July 18, 1991; Released: July 19, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed Transmittal No. 2982 on March 22, 1991. This transmittal introduces AT&T's seventeenth Competitive Pricing Plan (CPP17) under AT&T Tariff F.C.C. No. 15, scheduled to become effective on July 20, 1991. According to AT&T, CPP17 constitutes its competitive response to an offer made by US Sprint Communications Company Limited Partnership (US Sprint) to VoiceCom Systems, Inc. (VoiceCom). Petitions against this transmittal were filed by the Competitive Telecommunications Association (CompTel), MCI Telecommunications, Inc. (MCI), and US Sprint.[1] For the reasons discussed below, we suspend Transmittal 2982 for the full five-month statutory period.

II. BACKGROUND

2. AT&T contends that this transmittal represents its competitive response to an offer made by US Sprint to provide VoiceCom with telecommunications services at rates that are significantly below US Sprint's tariffed rates, and include other inducements such as the activation and testing of the NXX code assigned to VoiceCom and the activation of 800 numbers under that code. According to AT&T, VoiceCom has expressed its intention to accept the US Sprint offer if AT&T is unable to meet it. AT&T Transmittal 2982, Description and Justification (D&J) at 1-2.

3. CPP17 would provide VoiceCom with MEGACOM and MEGACOM 800 services under a postalized usage charge of 8.5 cents per minute, which would replace any other usage, recurring or non-recurring charges otherwise applicable under the standard MEGACOM tariffs. CPP17 requires VoiceCom to make a 225 million minute usage commitment over its five-year term, gradually loaded more heavily on the later years of the term, and AT&T asserts this generally follows the US Sprint proposal and the request for proposals released by VoiceCom. In addition, AT&T undertakes for a one-time charge of $107,000 to activate and test the NXX code assigned to VoiceCom by Bellcore, and activate up to 3000 numbers thereunder. D&J at 2-5; AT&T Tariff F.C.C. No. 15, Transmittal 2982, Section 19.1, 3rd Revised Page 50.

III. PLEADINGS

A. Petitions

4. CompTel and MCI incorporate by reference their pleadings and petitions against each prior Tariff 15 offering. *See* CompTel Petition at 2; MCI Petition at 4.

5. The petitioners argue that CPP17 fails to satisfy the competitive necessity test[2] upon which AT&T relies as justification for this filing. *See, e.g.*, CompTel Petition at 2; MCI Petition at 5-7. According to MCI, the competitive necessity doctrine applies to service provided to classes of customers, not single customers. Thus, the five-year term requirement and condition that customers must have received US Sprint's competing offer, combined with AT&T's assertion that US Sprint has not offered its Ultra 800 and Ultra WATS services at these rates and terms to any other customer, effectively limit CPP17 to a single-customer offering. MCI Petition at 6-7, *citing* AT&T Tariff 15, § 2.1.5.A.3, Murphy Affidavit at 7. MCI notes that AT&T's tariff requires the customer to demonstrate its receipt of a substantially similar offer from a competitor, but is silent as to the nature of the demonstration. *Id.* at 6.

6. MCI also contends that AT&T leverages its status as the incumbent inbound service provider, representing nearly 90 percent of the traffic up for bid, by "bundling" this Megacom 800 service with its outbound Megacom service.[3] MCI argues that VoiceCom's ownership of these 800 service numbers is not sufficient to offset the leverage exerted by AT&T, because it would cost VoiceCom considerable amounts in network reconfiguration and interaction with local exchange carriers to effect such a move. MCI Petition at 4-5.

7. MCI also asserts that CPP17 is effectively limited to VoiceCom because, while prospective customers must accept its five-year term and have received US Sprint's counterpart offer, US Sprint has not offered its services to any other customer under the rates and terms offered VoiceCom. Thus, MCI contends AT&T cannot invoke the competitive necessity doctrine. *Id.* at 6-7. Moreover, MCI argues, as CPP17 is not a "new service offering" as defined in Section 61.3(r) of the Commission's Rules, 47 C.F.R. § 61.3(r),[4] AT&T is required to submit a cost of service study under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38(b)(1), but has failed to satisfy that requirement. *Id.* at 7-8.

8. US Sprint also contends that CPP17 is a customer-specific offering and hence unreasonably discriminatory and, in any case, fails to satisfy the showing required by the competitive necessity test. First, US Sprint asserts, AT&T has effectively underpriced the US Sprint offer in three respects. AT&T provides a discount comparable to US Sprint's conversion allowance although no conversion expense is incurred by VoiceCom to remain with AT&T. Further, the AT&T offer would bill VoiceCom only for completed calls, while the US Sprint service would charge for all incomplete calls; US Sprint argues this difference represents an approximate price difference of twenty percent. In addition, the US Sprint offer does not guarantee the rate beyond 30 days. US Sprint argues that absent number portability, allowing AT&T to "match"

competing bids that include compensation to the customer for the conversion of 800 service effectively precludes competition. US Sprint Petition at 3-5.

9. As to the second element of the competitive necessity test, US Sprint asserts with MCI that AT&T's offer fails to meet competition without undue discrimination because it restricts the offering to a single customer. US Sprint contends that AT&T's statement of general availability leaves AT&T free to determine what constitutes similar service offered by a competitor, and the basis upon which it will evaluate such offers. Nor, according to US Sprint, has AT&T met the third prong of that test, as it has not demonstrated that the proposed discount contributes to reasonable rates and efficient services for all users. *Id.* at 5-7. US Sprint adds that the VoiceCom offer is an attempt to circumvent price cap regulation by offering nothing more than discounted Megacom and Megacom 800 services in Tariff 15, and suggests the Commission did not anticipate the consequences of selective transfer of price capped services into Tariff 15. Rather than accept the prospect of cross-subsidization and the incremental pricing of Tariff 15 offerings, US Sprint argues, the Commission should prohibit Tariff 15 offerings entirely. *Id.* at 7-10. Finally, Sprint asserts that the Commission has never stated that AT&T may justify Tariff 15 filings using a net revenue test, and in fact stated the contrary in the *Price Cap Order*, so that the absence of the more stringent showing contemplated by conventional tariff review warrants rejection of the AT&T transmittal. *Id.* at 10-11.

B. AT&T Reply

10. AT&T characterizes US Sprint's assertion that CPP17's rates are lower than the US Sprint offering as false and immaterial. Because VoiceCom intends to use its own 800 NXX, AT&T states, it will incur conversion costs regardless of the carrier chosen, and those costs are not relevant to the competitive necessity test in any case. As to charges for incomplete calls, AT&T notes that if such a provision exists in US Sprint's offer, it applies only when the incomplete call ratio exceeds ten percent. AT&T finally states that the CPP17 revisions contain no rate stability provisions, and that AT&T remains free to unilaterally initiate rate increase filings. AT&T Reply at 2-5.

11. As to MCI's contentions respecting bundling of Megacom 800 with Megacom service, AT&T states the CPP17 rates apply when customers subscribe to these services individually or together, and argues that anticompetitive leveraging cannot be asserted against an offering that is structured in response to the specific terms of a customer's request for proposals. Claims that the Communications Act prohibits single-customer offers, AT&T asserts, are foreclosed by court decisions recognizing such responses to competitors' similarly limited offers. AT&T also contends that if single-customer pricing is lawful for nondominant carriers, it is equally lawful for the dominant carrier. *Id.* at 5-7. In any case, AT&T adds, CPP17 is available to any customer who has been offered the US Sprint counterpart. Finally, AT&T asserts there is no prohibition against the use of a net revenue showing to satisfy the cost support requirement of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, and notes the Commission approved that test in the optional calling plan context. *Id.* at 7-10.

IV. DISCUSSION

12. We conclude, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the prohibition against unreasonable discrimination established by the Communications Act. Yet, as the Commission observed at the time it initiated its investigation of the first Tariff 15 offering, the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[5] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

13. We also conclude that the issues raised by CPP17 warrant exercise of our discretion to suspend this transmittal pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of service offerings. In deciding whether to suspend, we must balance the interests of ratepayers, the filing carrier, and the competitive process. On balance, we have decided that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal, and consequently the potential for harm to other ratepayers, outweighs any negative impact that suspension of these rates may have. Therefore, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

14. We will designate the issues to be examined in this investigation in a future Order.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revision filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal No. 2982.

16. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revision filed by AT&T Communications IS SUSPENDED until December 21, 1991.

17. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 91-546 is assigned for this purpose.

18. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 2982 filed by MCI Telecommunications, Inc., and US Sprint Communications Company Limited Partnership ARE DENIED.

19. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 2982 filed by the Competitive Telecommunications Association IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] CompTel Petition to Reject or, in the Alternative, To Suspend and Investigate, filed Apr. 8, 1991 (CompTel Petition); MCI Petition to Reject, filed Apr. 8, 1991 (MCI Petition); and US Sprint Petition to Reject, filed Apr. 8, 1991 (US Sprint Petition). AT&T replied to these petitions on Apr. 18, 1991 (AT&T Reply).

[2] AT&T relies on the competitive necessity test described in the *Private Line Guidelines*. The *Private Line Guidelines* state that, to justify a discriminatory rate on the grounds of competitive necessity, a carrier must show that:

> 1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer- owned systems -- is generally available to customers of the discounted offering;
>
> 2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and
>
> 3) the volume discount contributes to reasonable rates and efficient services for all users.

Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984).

[3] MCI states the Bureau proscribed such bundling in AT&T Communications, Inc., 5 FCC Rcd 3833 (1990), *appealed sub nom. American Telephone and Telegraph* Co. v. FCC, No. 90-1415 (D.C. Cir. Aug. 7, 1990); dismissed *per curiam*, Mar. 21, 1991.

[4] That section defines a new service offering as one:

> . . . that provides for a class or subclass of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers.

[5] AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7712, 7713 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-121

In the Matter of

Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas. RM-6015

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1991; Released: September 17, 1991

By the Commission: Commissioner Quello dissenting.

INTRODUCTION

1. Before the Commission are six petitions for reconsideration of the *Report and Order* ("*Report*") in this proceeding.[1] The *Report* adopted rules that permitted routine authorization of FM stations at nominally short-spaced transmitter locations as long as other stations are protected from interference. Two of the petitions request that the Commission's action be set aside; the remaining petitions support the basic decision but suggest refinements to the rules adopted. After careful consideration of the issues raised in these petitions, we reaffirm our decision to allow routine short-spaced FM assignments, but adopt several of the requested refinements.

BACKGROUND

2. The purpose of this proceeding was to consider technical methods by which FM station licensees could be afforded greater flexibility in the selection of antenna sites. These methods are utilization of directional antennas, reduction in operating facilities (effective antenna height and or transmitting power) and taking advantage of average terrain elevation in pertinent directions.

3. We initiated this proceeding in April, 1987, with a *Notice of Inquiry* ("*Inquiry*") to explore the possible use of directional antennas to allow assignment of FM broadcast facilities at short-spaced transmitter locations.[2] We noted that the FM service had developed into the largest and most popular aural service, and that future improvement of FM service may depend in part upon licensees having greater freedom in selection of antenna sites, including consideration of potential sites that do not meet the domestic minimum distance separation requirements in the rules.[3] We requested information needed to determine whether the technical characteristics of directional FM antennas could enable licensees to use short-spaced antenna sites and still provide protection to other FM stations' service.

4. Comments received in response to the *Inquiry* generally supported short-spaced antenna sites in the FM service, but urged that the Commission proceed cautiously in permitting such assignments in order to avoid increasing interference in the FM service. The comments also agreed that spacing requirements should be retained in the FM channel allotment process. After considering these comments, we concluded that we should propose changes to our rules to allow short-spaced FM assignments in certain limited situations. Accordingly, in February 1988, we adopted a *Notice of Proposed Rule Making* ("*Notice*")[4] proposing to amend Part 73 of the rules to allow FM short-spacing based on the established prohibited contour overlap assignment techniques used for noncommercial educational FM ("NCE-FM") stations operating in the portion of the FM band that is reserved for NCE-FM operations.[5]

5. The record developed in response to the *Notice* gave further support for the concept of greater flexibility in FM site selection. However, some commenters assumed that our proposal was considerably more far-reaching than we envisioned. Thus, in the *Report*, we stated that we were taking a conservative approach to the introduction of routine short-spacing in the FM service.[6] We discussed the major technical and administrative issues raised by commenters, and after considering these viewpoints, we adopted specific amendments to Part 73 of our rules to permit authorization of short-spaced antenna sites. These rule amendments became effective on June 26, 1989.

THE PETITIONS FOR RECONSIDERATION

6. The Association for Broadcast Engineering Standards, Inc. ("ABES"), du Treil, Lundin & Rackley, Inc. ("dLR"), Genesis Broadcasting, Inc. ("Genesis"), Greater Media, Inc. ("Greater Media"), Mullaney Engineering, Inc. ("Mullaney") and the National Association of Broadcasters ("NAB") filed petitions for reconsideration of the *Report and Order*. Comments supporting and/or opposing the petitions for reconsideration were filed by the following parties: the Association of Federal Communications Consulting Engineers ("AFCCE"), John F. X. Browne & Associates ("Browne"), JAB Broadcasting Corporation ("JAB"), the National Association of Broadcasters ("NAB"), WHOK Incorporated ("WHOK") and WTRJ Broadcasting, Inc. ("WTRJ"). Additionally, on May 11, 1990, NAB joined with ABES, dLR, Greater Media and Mullaney in filing a "Consensus and Joint Supplement to Petitions for Reconsideration" ("Consensus"). This resulted in the Commission's issuing a June 22, 1990, Public Notice reopening the proceeding to obtain additional pub-

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[1] *See Report and Order*, MM Docket No. 87-121, 4 FCC Rcd 1681 (1989).
[2] *See Notice of Inquiry*, MM Docket No. 87-121, 2 FCC Rcd 3141 (1987).
[3] *See* 47 CFR Section 73.207(b)(1), Table A.
[4] *See Notice of Proposed Rule Making*, MM Docket No. 87-121, 3 FCC Rcd 1820 (1988).
[5] The first 21 channels in the FM band are available for assignment only to NCE-FM stations. *See* Sections 73.501 and 73.509 of the Commission's Rules.
[6] *See Report* at paragraph 22.

lic comment. The deadline for filing comments on the Consensus was July 20, 1990, with reply comments due on or before August 3, 1990. NAB filed additional comments and dLR filed reply comments in response to the Public Notice.

DISCUSSION OF ISSUES

Issue 1: Whether the decision providing for FM directional antenna operation should be reversed

7. ABES and NAB request that the decision to permit FM directional antenna operation be set aside.[7] NAB asserts that the Commission ignored the notice requirements of the Administrative Procedures Act, 5 U.S.C. 553(b), by failing to give adequate notice that rules might be adopted which would establish limits on the use of contour protection, affect NCE-FM stations, and employ the use of terrain shielding to make short-spaced FM assignments.[8] It further claims that the Commission acted arbitrarily and capriciously by taking inconsistent positions with respect to the merits of directional antennas.[9] NAB also alleges that the Commission committed "manifest error" and made material omissions when it failed to include in its contour protection scheme "key regulations and policies" essential to protect FM stations from interference.[10] NAB urges the Commission to suspend action taken in the *Report* and to afford an opportunity for public comment on issues related to FM shortspacing by use of directional antennas. The need for additional rule making is supported by the Consensus, although the primary thrust of the Consensus is the need to improve and refine the current rules.

8. ABES opposes any exemption from the rules requiring minimum distance separations between co-channel and adjacent-channel FM stations. ABES argues that the rules adopted in the *Report* undercut these spacing requirements, and that any use of directional antennas to permit short-spaced FM assignments should be limited to case-by-case resolution of site availability problems not solvable by any other means. Specifically, ABES suggests limiting the authorization of FM directional antennas to situations involving the loss of a transmitter site, alleviation of adverse environmental conditions or resolution of FAA coordination problems. ABES further states that if directional antennas are to be relied upon to prevent interference, the Commission should strengthen its requirements regarding the design and installation of such antennas.[11] ABES believes that the Commission is abandoning the practice of making channel allotments based on distance separation requirements in favor of contour protection and that no consideration was given to the implications of such an action in regard to the Commission's responsibility to provide a fair, efficient and equitable distribution of radio facilities under Section 307(b) of the Communications Act of 1934, as amended.[12]

9. ABES also claims that the Commission adopted rules providing short-spaced FM assignments based on terrain shielding and terrain roughness, without providing notice that these factors would be considered. [13] ABES apparently believes that the requirement for determining antenna HAAT in particular directions is the same as utilizing "terrain shielding" or a "terrain roughness factor."[14] ABES asserts that these terrain considerations were not discussed in the *Notice*. Thus, it claims that adequate notice on this matter was not given and the entire *Report* is "fatally" flawed. NAB agrees with ABES stating that the Commission should not have adopted a terrain shielding rule without giving proper notice under the Administrative Procedures Act.

10. The remaining petitioners for reconsideration (dLR, Greater Media, Genesis and Mullaney), as well as other parties filing comments, while raising a variety of technical problems deriving from the new rules, support the Commission's intent in permitting more general use of FM directional antennas.

11. Greater Media, for example, believes that the *Report* reflects a measured approach to the sensitive issue of short-spacing, which balances the needs of licensees for site flexibility with the reasonable expectations of other licensees and the listening public.[15] JAB rebuts NAB's allegation that inadequate notice of the proposed rules was given[16] and affirms that in protecting the service of existing stations, limits on the protection of their contours is a necessary concomitant.[17] JAB also notes that terrain shielding Commission as long as FM stations have been authorized and that the Commission's failure to explicitly discuss it in the *Notice* is roughly akin to failing to mention that service areas are dependent upon antenna height and effective radiated power.[18] It also argues against those who believe that the authorization of FM directional antennas constitutes the "AMization" of the FM band, noting that the disparity between the two services is too obvious to belabor. Such an argument, JAB believes, is merely a thinly disguised argument for retention of the *status quo*, because without contour protection and directional antennas, and with limitation of height and terrain considerations, there can be no expansion of FM services throughout the country other than by new allotments,

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[7] NAB subsequently filed a Motion for Stay of the new rules on April 24, 1989, which was denied by *Order*, DA 89-673, adopted June 14, 1989.

[8] *See* NAB *Petition for Reconsideration* at 6.

[9] *Id.* at 9.

[10] *Id.* at 12.

[11] *See* ABES *Petition for Reconsideration* at 1-2 and 4.

[12] *Id.* at 3 and 9.

[13] *Id.* at 6.

[14] *Terrain shielding* refers to the effect of a substantial obstruction (such as a mountain range) on signal intensity at a point beyond the obstruction. The Commission has not adopted any rules providing for regular use of terrain shielding for any purpose in the commercial FM service. The *terrain roughness factor* is an adjustment to the F(50,50) propagation charts in Section 73.333 of the rules to compensate for the difference between the "average" terrain roughness on which these charts are based (50 meters) and the actual "roughness" of the terrain profile in a particular situation. The FM rules have contained provisions for this factor for many years (*see* Section 73.313(i) and (j)), but the effective date of these provisions was stayed indefinitely in 1977, pending further review by the Commission. Neither shielding nor roughness was incorporated in the rules permitting short-spacing.

[15] *See* Greater Media petition at 1.

[16] *See* JAB comments at 2.

[17] *Id.*

[18] *Id* at 3.

which may only be created in limited numbers.[19] In a similar vein, WTRJ argues that directional antenna rules which permit small short-spacings are in the best interest of the broadcast industry and will permit service to the public that would not be possible without the flexibility provided.[20]

12. The rules adopted in the *Report* do not represent a departure from traditional methods of contour protection. They are largely based on an accurate determination of the antenna height above average terrain ("HAAT") in critical directions and they reflect essentially the same method for determining HAAT that we have used for years in the non-commercial FM service and the Low Power TV service. Contrary to the assertions of ABES and NAB, our rules for determining antenna HAAT for short-spaced FM facilities do *not* include provisions for the use of either terrain shielding or a terrain roughness factor. Instead, we have taken the well-established procedures currently required in the NCE-FM service and the Low Power TV service and adapted them for use in calculating protected and interfering contours for short-spaced FM station assignments.[21] Adequate notice of the HAAT rules adopted was given because the *Notice* clearly proposed use of predicted field strength contours as in the NCE-FM service, and the position of such contours in that service are now and have always been based on calculations of antenna HAAT in specific directions. Thus, the rules adopted in the *Report* do not implement a novel method of "terrain shielding" or use of a "terrain roughness factor," but rather, represent another application of a method already used in other services. Therefore, we will deny the request of ABES and NAB petitions that the rules be set aside on the basis of alleged use of terrain shielding and roughness.

13. With respect to the impact of contour protection on our general allotment rules, we have held throughout this proceeding that no change has been made or will be made in the FM channel allotment process. All proposals for channel allotments must meet the minimum distance separations of Section 73.207 of our rules with respect to other existing and prospective stations. All station assignments are still bound by the requirement of Section 73.315(a), which requires a minimum field strength of 3.16 millivolts per meter over the principal community to be served. Therefore, these rules do not alter the service obligations of licensees. Consequently, the use of directional antennas permitted by our rules is not inconsistent with the mandate of Section 307(b). Therefore, we will deny that part of ABES's petition for reconsideration concerning the impact of FM directional antennas on the current FM channel allotment process.

14. While the *Report* clearly stated that no change was being made to the FM channel allotment process in this proceeding, Mullaney Engineering asserts that this point is not clearly expressed in paragraph (a) of Section 73.207 and that this could easily be misunderstood by the public. Upon review of that particular paragraph, we agree with Mullaney that the existing wording of paragraph (a) of Section 73.207 could be misinterpreted. Thus, we are making a minor editorial change to avoid misunderstanding.

15. Because contour protection has been used for many years in the NCE-FM broadcast service, we anticipated that there would be little question of its validity as a station assignment methodology. In the *Report*, we noted that contour protection takes into account the differences in elevations of the terrain surrounding stations, whereas the distance separation requirements are based on average terrain assumed to be uniform in all compass directions. We observed that this failure to account for variations in the HAAT as a function of direction means that the separation requirements sometimes overprotect, and at other times, underprotect FM service. Thus, contour protection is a more accurate approach to making FM assignments. Consequently, we did consider this matter in the *Report* and thus must reject NAB's assertion that the Commission did not consider whether contour protection would adequately protect the FM service.

16. The foregoing discussion describes the general engineering principles that underlie the FM directional antenna rules and demonstrates their origin in previously used and well-tested station assignment practices. Our experience in working with the new rules since their adoption also convinces us that they are effective in resolving cases requiring transmitter site flexibility without any adverse impact on the FM channel allotment process.

17. With respect to the NAB and ABES allegations that we did not provide adequate notice of our proposals, we note that 5 U.S.C. 553(b)(3) requires only that agencies give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." NAB is correct that when the Commission proposed to relax its spacing rules to permit short-spacing where contours were protected, it did not suggest that some spacing limits would still be maintained. In response to concerns expressed by commenters, including NAB, that this approach might cause objectionable interference, the Commission took a somewhat more cautious approach and retained some spacing requirements. Such a decision is well within the scope of the *Notice* and self-evidently a "logical outgrowth" therefrom. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F. 2d 506, 547 (D.C. Cir. 1983). With respect to NAB's suggestion that there was insufficient notice that non-commercial FM stations might be affected, presumably because short-spacing to non-commercial stations might be permitted, paragraph 12 of the *Notice* indicated that short-spacing would be permitted to "adjacent and co-channel stations and allotments...." 3 FCC Rcd at 1821. Some non-commercial stations and allotments are, of course, adjacent to commercial stations. Thus, it was self-evident in the *Notice* that such non-commercial stations could be affected. Indeed, NPR recognized in its comments that some non-commercial stations would be affected. Finally, as indicated above in paragraph 12, we have not allowed the routine use of terrain shielding or terrain roughness. In footnote 15 of the *Inquiry* we specifically declined to consider terrain roughness in this proceeding. Terrain variation is a fundamental component of the contour determination process, an issue discussed in paragraph 15 of the *Inquiry* and paragraph 24 of the *Notice*. In view of

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19 *Id* at 3-4.

20 *See* WTRJ comments at 2.

21 However, as stated in the *Report*, the overall HAAT will be computed in accordance with the traditional eight-radial procedure for purposes of station authorization. Overall HAAT is used for determining station class and maximum power limit.

the extensive description of the subject in both the *Inquiry* and the *Notice*, we find that the notice requirements of the Administrative Procedures Act were legally satisfied.[22]

18. We turn next to considering various refinements to the FM directional antenna rules suggested by the petitioners and commenters. Generally, these issues require only brief discussion.

Issue 2: Whether the "next lower class" limitations in Section 73.215(e) should be replaced by a fixed limit on short-spacing

19. Currently, Section 73.215(e) limits the amount of short-spacing permissible using FM directional antennas. A table in that section sets forth distance minima that are derived from those of stations of the next lower class for co-channel and first, second and third adjacent channels. These limits were selected because we believed they would provide a modest but nonetheless useful basis for some flexibility in site selection. In order to minimize the burden on our processing staff and to identify any unforeseen problems associated with processing these applications, the table was qualified by a note temporarily limiting the short-spacing in any case to not more than 8 kilometers (5 miles).

20. Comparing the new permitted minimum short-spaced distances given in Section 73.215(e) with the normal separation distances listed in Section 73.207(b)(1), dLR observes that many facilities with second and third-adjacent channel spacing problems will receive little or no benefit. dLR cites examples in which stations would be better served under the previous Commission policies, because under those policies, there was a possibility that the Commission would authorize a short-spaced antenna location by waiver. dLR contends that the general requirement for complying with the spacing requirement of the next lower class should be eliminated. dLR also recommends, apart from the temporary 8 kilometer limitation, that there should be no distance restrictions as long as interference to another facility (with assumed maximum facilities if not so operating) is not created or increased.

21. Comments from AFCCE also note that new permitted short-spacings listed for most co-channel and first adjacent channel stations range from approximately 20 to 40 km. However, for second and third adjacent stations, AFCCE notes the allowable short-spacing in most cases is from 0 to 3 km, with only two instances of 5 km short-spacing, and one instance of 12 km shortspacing. As a result of the new short-spacing restrictions, AFCCE also believes that there will be numerous instances in which FM stations could relocate only a very small amount, if at all. In addition, AFCCE notes that the table in Section 73.215(e) contains numerous discrepancies. AFCCE agrees with the petitioners that the new short-spacing criteria based on "the next lower class of station," creates serious limitations. AFCCE suggests that many simpler and equally valid schemes to limit short-spacing exist, such as using 15% of the full spacing for each class.

22. The table in Section 73.215(e) gives one minimum short-spaced separation distance for each class pair regardless of the class of station to be short-spaced. Problems occur when we mix classes, *e.g.* B to C.[23] Also, flexibility for second and third adjacent channels is modest because spacings are tight to begin with. Moreover, since the adoption of these new shortspacing distances, the Commission created an additional intermediate C3 class of FM broadcast station for Zone II with maximum facilities of 25 kW effective rated power at 100 meters reference height above average terrain, and has also increased the maximum permitted power for Class A stations, including increased minimum separation distances with respect to Class A stations.[24] Prior to creation of the Class C3 stations, Class A station status was the next lower class from a Class C2 station that might propose to short-space its facilities; now, Class C3 is the next lower station classification in such situation. Also, with the Class A power increase provisions, the previously permitted amount of short-spaced separation has been reduced towards Class A stations. Thus, portions of the table in Section 73.215(e) need updating.

23. Many of the other petitioners and commenters also believe that the limits in the Section 73.215(e) table are arbitrary and unduly restrictive (particularly in the case of second and third adjacent channel separations). There appears to be some agreement that a fixed limit should be applied. The most popular limit mentioned is 8 kilometers (5 miles), or 15% of the required distance separation (AFCCE). Eight kilometers is, of course, the limit currently imposed by what was intended as a temporary note to the table in Section 73.215(e). However, we believe that we should continue to strike a balance between the 8 kilometer initially imposed and the essentially unrestricted limit suggested by dLR. Therefore, we believe that the "next lower class" approach continues to be the most suitable limit at this time. Accordingly, Section 73.215(e) will be updated to reflect changes in the station classes that have occurred since its adoption and to consistently reflect that the amount of short-spacing permitted is the lesser value obtained by referring to Table A in Section 73.207.[25]

Issue 3: Whether the Commission should reinstitute waivers of Section 73.207

24. We concluded, in the *Report*, that the new FM short-spacing rules would permit us to discontinue granting waivers of Section 73.207 for co-channel and adjacent channel short-spacing. Greater Media urges us, however, to reconsider this policy change. Greater Media claims

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[22] We have also addressed this issue and reached a similar conclusion in the *Order Denying Stay Request* adopted June 14, 1990, which also responded to allegations of inadequate notice made by NAB in it Motion for Stay. *See* paragraphs 8 and 9 of that *Order*.

[23] Thus, for a Class C to Class B co-channel short-spacing, we find that the next lower class limit of Class C1 to Class B spacing is 270 km. The next lower class limit for Class B1 to Class C spacing is 259 km. In the interest of uniformity, we chose the greater of the two values and specified 270 km in Section 73.207(e).

[24] *See* MM Docket No. 88-375, *First Report And Order*, 4 FCC Rcd 2792 (1989) and *Second Report And Order*, 4 FCC Rcd 6375 (1989).

[25] We note that action taken in the *Second Report and Order* in MM Docket No. 88-375 exempts certain Class A stations from the 8 km short-spacing limit. This decision was affirmed on reconsideration in that proceeding and the instant action does not alter that result.

that over the years, such waivers for minor, though not necessarily *de minimis*, short-spacing have well served licensees and the public by encouraging multi-station co-location of facilities and the use of shared antenna systems in many metropolitan areas. In a typical multi-user common antenna system, an omni-directional antenna is shared by a number of area stations. Greater Media suggests that most metropolitan facilities are tightly hemmed in by a number of co-channel and adjacent channel stations, many of which were allotted and/or improved in the past under much more lenient short-spacing standards.[26]

25. Greater Media further notes that the necessary reduction of power would automatically trigger the condition that these stations henceforth would only be protected to the extent of their diminished coverage contours. Greater Media states that this result is unacceptable to it and other affected stations, and would certainly discourage desirable co-location of facilities in metropolitan areas. Thus, under these circumstances, Greater Media suggests that the continued ability of stations to seek waivers for very minor short-spacings, subject to a showing of need, should be an essential component of the Commission's scheme to increase licensees' flexibility in site selection.

26. Greater Media argues that it is unfair and unrealistic to expect voluntary diminution of coverage and protection by a group of licensees in a major metropolitan area, yet this is the impact it sees of the change in waiver policy. Greater Media stresses that the difficulties, as well as the benefits of re-siting FM radio facilities are greatest in metropolitan areas, and multi-user antennas in many cases provide the only practical option &available to licensees from both a logistical and financial standpoint. Greater Media, therefore, suggests that the Commission should not foreclose the waiver option by exacting diminished signal contours which could benefit many licensees in maintaining and enhancing service to the public in areas where site selection is particularly constrained. For these reasons, Greater Media concludes that the Commission should rescind its "no waiver" policy concerning this issue. At the very least, Greater Media requests that the policy of routinely permitting short-spacings of up to one mile be retained.

27. The FM directional antenna rules were developed in order to permit stations to short-space in cases of necessity without diminishing the coverage of other stations. Certainly, technology exists that will afford the desired protection. Moreover, we viewed the policy of waiving Section 73.207, even if only to permit short-spacing of a mile, as undesirable because it undermines, at least to some extent, the effectiveness of the distance separation table. Neither Greater Media nor other commenters provided convincing arguments that a limited number of Section 73.207 waivers are necessary. The adopted Section 73.215 provides for site selection flexibility in those exceptional circumstances where no fully spaced sites are available. We do not believe additional short-spacing waivers of Section 73.207 would generally be in the public interest where an alternative means of achieving a similar result, such as Section 73.215, is available.[27] Therefore, we will deny the requests that we reinstate consideration of Section 73.207 waivers.

Issue 4: Whether stations employing directional antennas should be protected to maximum permissible, rather than actual, facilities [Section 73.215(b)(2)]

28. Currently, Section 73.215(b)(2)(iv) indicates that FM stations using directional antennas authorized pursuant to the new rules will be protected only to the contour defined by their current facilities. WHOK argues that because stations using directional antennas would likely be forever frozen at that signal pattern, it would be difficult, if not impossible, to guarantee reliable community service in the face of shifting population centers. This scenario, WHOK observes, is at odds with the notion that radio station allocations[28] should be flexible to respond to the growth and demographic shifts that occur over time in most communities and regions.

29. We chose to protect actual contours because their locations are well defined, whereas the placement of desirable future contours is unknown. In addition, use of maximum permissible facilities would overprotect a station because any potential service increase might not be attainable or desired. In any event, it is not apparent the stations would be "frozen" forever as a result of this decision. For the near future, we expect it to be a rare event when a station authorized pursuant to Section 73.215 must be protected by another station changing its site pursuant to the provisions of Section 73.215. Even where it occurs, we believe the probability is low that the second station would encroach on the first in a way that would preclude desirable and practical directional antenna modifications. We did consider the idea of overlaying the actual contour on a full-facility omnidirectional contour to show the limits imposed by short-spacing and the potential expansion in other directions. However, this presents problems of maintaining two

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[26] According to Greater Media, Washington, D.C. is an example of this situation where virtually every station is short-spaced to some extent. Greater Media claims that a move of any of these facilities (other than those already located at the desired site) to either of two newly proposed multi-user antenna sites in the Washington area would result in every case with slight, but not *de minimis*, newly created short-spacings or worsening of existing short-spacings. With current technology, Greater Media asserts that a multi-user antenna cannot be directionalized for individual frequencies. Thus, Greater Media states that the only option permitted under the Commission's new rules is for all such affected facilities to reduce power to the extent necessary to provide equivalent contour protection to all short-spaced stations if the desired co-location is to be realized.

[27] Nevertheless, at the time the new rules were adopted, we did not give sufficient weight to the fact that there may be a very small number of cases, such as the one cited by Greater Media above, where the public interest would be better served by waiver of the rules rather than application of the directional antenna requirements of Section 73.215. Therefore we will consider waiver of Section 73.215 to permit greater power in a short-spaced station's direction where it is demonstrated that such a facility is necessary to allow use of a multiplexed transmitting antenna and that its authorization would otherwise serve the public interest, for example, by allowing retention of existing service to an underserved area.

[28] While WHOK refers to "allocations," the context of the comment suggests that the intended meaning should be "assignments."

patterns and artificially melding them. Accordingly, we are denying the request for protection of maximum possible facilities.

Issue 5: Received interference in currently unserved areas

30. In the *Report*, we noted that virtually all commenters agreed that licensees should not be allowed to accept interference beyond that permitted by the rules. It was also concluded that the Commission, at this time, prefers to gain further experience with various methods of limiting interference, such as through the use of directional antennas. Thus, the rules were not revised to permit acceptance of additional interference. dLR, in its petition, suggests that opponents of the concept of allowing stations to receive interference are envisioning the selling and buying of interference rights. While dLR recognizes that concern, it notes that interference may be received in some instances without service loss. dLR reports that this could occur when a station increases its signal and new interference is received within a portion of what would have been the station's new service contour. dLR observes that if no service was provided to that particular area before the station's adjustment, then effectively, no new interference is caused. dLR thus argues that the public loses nothing and will likely gain improved service by a station's moving to a location which enables it to maximize population served. Browne agrees with dLR on this issue. Accordingly, dLR suggests that the Commission weigh and counterbalance the necessity of receiving interference against the extent of additional service to be rendered.

31. We do not believe we should permit acceptance of interference, even under the limited scenario presented by dLR. Essentially, dLR's petition reduces to a proposal to allow applicants to negotiate interference standards on a case-by-case basis. The selection of such interference standards is properly a function of the Commission. We further note that one station's acceptance of interference would preclude some future facility changes by the station which causes the interference. Accordingly, we are denying dLR's request that we consider allowing stations to accept interference in limited cases.

Issue 6: Whether "equivalent protection" rather than "contour protection" should be used in the authorization of directional FM stations

32. dLR and Mullaney suggest that some of the complexities associated with the contour protection method used in conjunction with FM directional antenna authorization could be avoided by using what each believes is a more straightforward approach. dLR proposes "equivalent protection" as used in the television service. Under equivalent protection, affected stations[29] are considered to operate with maximum facilities for their class, with circular coverage areas. To use it in the FM service, an effective service contour would need to be selected which is outside the normally protected station contour.[30] The area of interference within the effective service contour that would be caused by a minimally-spaced full-facility station is then determined. This area represents the degree of interference permitted by the distance separation rules. Permitted effective radiated power may then be determined at the proposed short-spaced site to produce the same interference area.

33. dLR suggests two ways for determining the facilities of the shortspaced station. First, use of maximum antenna height is assumed and the power is adjusted to provide the equivalent protection just described. Alternatively, the HAAT could be determined using the standard 8-radial procedure, which would permit a lesser power reduction for a station with less than maximum antenna height. This approach is said to avoid discontinuities between the fully-spaced allotment rules and the short-spaced assignment rules, at least in the co-channel and first adjacent channel cases. It is also relatively insensitive to the propagation curves and interference protection ratios used.

34. Mullaney prefers the alternative method of protection used under the provisions for grandfathered short-spaced FM stations in Section 73.213. That rule allows grandfathered short-spaced stations to move their facilities provided their 1 mV/m contours do not move closer to the stations to which they are short.

35. It is not evident that these methods are less complex, nor would they yield actual interference protection as effective as the adopted method. Mullaney's method could allow the antenna height of the encroaching station to be elevated in its change to a new site with the interfering contour conceivably overlapping the protected station's service contour. Similarly, the dLR approach fails to account for variations in terrain elevations in different directions from the protected and interfering stations' transmitter sites. Therefore, to avoid authorizing harmful interference, we will maintain the adopted method involving contour overlap protection ratios.

Issue 7: What should be done about inconsistencies in the Section 73.207 table of distance separation requirements and whether the second adjacent channel protection requirements in Section 73.215(a)(2) are excessive

36. Mullaney argues that the distance separation requirements of Section 73.207 do not provide uniform contour protection for FM stations. Minor inconsistencies have come from rounding the required distances and changing the propagation curves, but Mullaney points out that a major difference exists between the required distance table and the contour overlap protection criteria adopted for second adjacent channel situations. While the distance table requires the same separation between second adjacent channel stations as it does between third adjacent channel stations (based on the contour protection criteria used for the third adjacent channel, *i.e.*, an interference contour that is 40 dB higher than the protected contour), the protection ratios we adopted for contour overlap are based on an interference contour that is 20 dB higher than the protected contour, which is more

[29] "Affected stations" are stations to which another station (as applied to the instant proceeding, a directional FM station) wishes to short-space.

[30] dLR points out that a minimally usable monaural FM signal may be as little as 0.050 mV/m.

restrictive. Browne supports Mullaney in this matter. Mullaney suggests that we amend Section 73.207 to remove at least the minor inconsistencies.

37. Changing the Section 73.207 distance spacing requirements is far beyond the scope of this proceeding. However, we are concerned about the inconsistent treatment of second adjacent channel stations accorded by the commercial FM distance separation table in Section 73.207 and the site flexibility provisions in Section 73.215. In adopting the contour protection provisions our model was the interference protection criteria that have been employed successfully by non-commercial educational FM stations (Section 73.509). In most situations, the NCE-FM requirements are based on the same planning factors as the commercial FM requirements. However, the second adjacent channel protection ratio is a significant exception. The adopted rules establish an incongruity in the way commercial FM stations are treated. Both the Section 73.207 domestic distance separation table and the Section 73.215(e) minimum distance table, which limits the extent of short-spacing, are based on the 40 dB protection ratio while the adopted contour protection provisions of Section 215(a) require use of the more restrictive 20 dB protection ratio. We have no reason to believe that the commercial FM second adjacent channel protection is inadequate, or that it allows significantly more actual interference than NCE-FM protection. Therefore, even though our confidence that contour protection is a valid approach is founded in part on our non-commercial educational FM experience, we now believe that it is more important to make the commercial FM contour protection provisions internally consistent with the other commercial FM requirements. Accordingly, we will amend Section 73.215(a)(2) by replacing the overlap provision for an interference contour that is 20 dB higher than the protected contour of second adjacent channel stations with one that is 40 dB higher.

Issue 8: Whether there is a need for the directional antenna limit of 2 dB per 10 degrees radiation pattern rate of change and how it and the limit of 15 dB on the ratio of maximum to minimum radiation should be applied [Section 73.316(b)]

38. In the *Report*, we concluded that our existing policy of restricting the rate of change of the horizontal antenna radiation pattern to 2 dB per 10 degrees of azimuth should be applied to all future directional antenna systems. Additionally, due to a lack of support in the comments, we decided not to amend the current requirement restricting the maximum to minimum antenna pattern gain to a 15 dB ratio. In its reconsideration request, dLR states that, in some cases, the 2 dB per 10 degree standard would require an expensive panel antenna when an economical side-mounted antenna could provide adequate protection. dLR further claims that the rate-of-change standard does not have any present engineering justification. dLR notes that the standard was developed to govern applications for grandfathered short-spaced stations. In such cases, the station was limited in power and antenna height in the direction of the station to which it was short-spaced.[31] dLR indicates that protection in such cases was calculated only along the connecting radial to the pertinent station and the rate-of-change standard served to prevent interference along other radials toward the pertinent station's service area. dLR argues that because the rules adopted in this proceeding require protection of the entire service area of the station to which the application is shortspaced, the 2 dB per 10 degree standard is no longer necessary.[32]

39. Browne agrees with dLR, but suggests that applicants be required to show how the directional antenna pattern would be achieved, certified and maintained if greater rates of change are employed. Browne also proposes the same showing requirement for the use of an antenna with a ratio of maximum to minimum radiation greater than the 15 dB allowed by Section 73.316(b)(1). Mullaney suggests that the 15 dB maximum to minimum ratio and the 2 dB/10 degree limitations only apply to stations' predicted antenna radiation patterns (the "envelope" patterns from construction permit applications) and not to the "as built" patterns filed with license applications.

40. Upon reconsideration, we are persuaded that we should apply the 2 dB per 10 degrees rate of change limitation only where the directional antenna is used to provide protection to a short-spaced station. At this time we are not prepared to eliminate or otherwise change either this requirement or the 15 dB maximum to minimum radiation ratio limit. While we recognize that the contour overlap provisions of Section 73.215 adopted in this proceeding require protection of a station's entire service area, we do not have an adequate record to justify relaxing these antenna requirements. We expect to further consider these matters when we institute a separate proceeding on FM directional antennas. Finally, we are amending Section 73.316(b)(1) to clarify that we now consider the 15 dB maximum to minimum radiation limit to be a requirement imposed on the antenna design and, while the goal should be to construct an antenna that will match the predicted pattern, we recognize that the actual pattern of the constructed and installed antenna may depart from that limit.[33]

Issue 9: Whether provisions are needed to limit the effects of potentially re-radiating objects and the effects of platforms [Section 73.316(c)(6)&(7)]

41. Greater Media argues that the incursion of conduits, transmission lines, detuning skirts and a host of other metallic objects with their collective potential for re-radiation into the antenna aperture and its immediate vicinity creates precisely the same potential for pattern distortion as the incursion of an additional antenna. Therefore,

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[31] *Fourth Report and Order* in Docket No. 14185 (FCC 64-919), 29 FR 14110, 14116, October 14, 1964.

[32] dLR also requests clarification of Section 73.316(c)(2) as to the need for an expanded scale on antenna pattern plots, noting that the expanded scale is only needed if the ratio of maximum to minimum radiation exceeds 20 dB.

[33] We will retain the Section 73.316(c)(2) requirement to use an expanded scale when displaying a pattern with greater than 20 dB maximum to minimum radiation. While this rule does not apply to most antennas, it does provide for a more precise description of the antenna patterns in those few cases where a waiver of the 15 dB rule is justified or the actual "as built" pattern exceeds 20 dB.

Greater Media urges the Commission to revise Section 73.316(c)(7), which restricts other antennas' incursions into the aperture of a directional antenna, to restrict these other incursions too. ABES makes a similar recommendation.

42. dLR, however, takes the opposite view, arguing that the rule governing antenna placement and tower construction are arbitrary and unnecessary. dLR believes that with appropriate antenna modeling, it is possible to take placement of other antennas and other physical objects in the vicinity of the antenna into account. dLR claims that because an antenna is no different from any other physical object, its placement in the aperture of another antenna should not be objectionable. dLR believes that not allowing antennas to occupy the same levels on a tower may cause increased harm to the environment because antennas that could otherwise share the same tower would be required to be mounted on a new tower.

43. Browne agrees with dLR and concludes that such a blanket rule cannot be supported on an engineering basis and recommends instead requiring the applicant to submit engineering data demonstrating that the proposed mounting arrangement considers the effects of other potentially re-radiating or reflecting objects within (or near) the aperture of the antenna. AFCCE agrees that such outright prohibitions of mounting directional antennas on platforms or in the aperture of other antennas are unwarranted. Instead, AFCCE suggests that the permittee and antenna manufacturer should be required to show accurate and stable directional operation under all reasonable conditions.

44. In a similar vein, Genesis seeks relaxation of Section 73.316(c)(6), which severely limits installation of FM directional antennas on platforms. Genesis states that it recognizes the Commission's desire for rules that ensure to the greatest extent practicable that stations operating at short-spaced locations using FM directional antennas will not cause interference. However, Genesis believes that this paragraph is unnecessarily restrictive because not all directional antennas are used for short-spaced assignments. Genesis noted that FM directional antennas have been successfully used in the past to meet other technical restraints, *e.g.*, to achieve compliance with signal restrictions over designated Quiet Zones, or to provide improved service without the need for the proscription contained in Section 73.316(c)(6). Moreover, Genesis asserts that it is possible to design and model an FM directional antenna to take into full account the effect on the array of a platform which is larger than the cross-sectional area of the tower. Thus, Genesis concludes that the blanket proscription contained in Section 73.316(c)(6) is excessively restrictive.

45. The intent behind the provisions of Section 73.316(c)(6) and (7) was to ensure that the pattern of a directional antenna was not distorted by other nearby objects in the horizontal plane. For example, the "platform restriction" was developed out of concern that a directional antenna intended to be mounted on top of a tower in an unobstructed configuration could have its pattern distorted by another FM, TV or even a land mobile antenna that might be mounted nearby elsewhere on the platform.

46. We continue to believe that at this time we must proceed cautiously and assure that FM directional antennas operate in a controlled, unobstructed and static environment. Our review of the provisions in Section 73.216(c)(6) and (7) leads us to conclude that they strike an appropriate balance between the differing concerns of the parties in this proceeding and that their amendment at this time is not warranted. However, we recognize that these provisions could unnecessarily preclude some valid FM directional antenna designs. Therefore, while we will consider waiving these rules in appropriate cases, upon a showing that the particular antenna design takes into consideration all other nearby antennas and other potentially reradiating structures, the requests for amendment of Section 73.216(c)(6) and (7) will be denied.[34]

Issue 10: Whether the rules assure that directional antennas are installed properly [Section 73.316(c)(8)]

47. NAB questions whether the use of a licensed surveyor, as required by the new rules, is adequate to ensure that an FM directional antenna is installed properly. NAB agrees that a licensed surveyor can determine the orientation of an installed FM antenna, but questions whether a surveyor can determine the proper installation of the antenna. NAB notes that there are many critical items to be checked when determining whether an FM directional antenna installation is correct (*e.g.* the position of the radiating elements, the proximity of metallic objects, the spacing from the broadcast tower). NAB asserts that a surveyor may not always be the best qualified professional to make these judgments. NAB claims that designing and installing directional antennas is difficult and complex technical work, and there needs to be some minimal guarantees that the work is done properly. Thus, NAB suggests the Commission should consider a requirement that the directional antenna design, instructions for installation and field measurements be certified by a "registered professional engineer."[35] However, JAB questions whether the use of a registered professional engineer is necessary.

48. We agree with the petitioners that a refinement in Section 73.316(c)(8) is necessary. On reconsideration, we believe that certification of an FM directional antenna's installation "pursuant to the manufacturer's instructions" is outside the competence of a surveyor. Therefore, we are revising the rule to require that the *installation* be certified by an engineer whose qualifications shall be submitted at the time of application for license. However, inasmuch as most electronics engineers are not trained in surveying, we will continue to require that a licensed

[34] By "nearby" we mean those antennas and structures located within the aperture of the directional antenna and within any unobstructed distance specified by the directional antenna manufacturer.

[35] A registered (or "licensed") professional engineer is one who has qualified (principally by education, experience and examination) for a state license to practice engineering in the state in which he or she resides or practices. Although professional engineers in all of the various engineering disciplines (*e.g.* civil, electrical, nuclear, etc.) receive the same type of certificate or license, the qualifying examination and experience must relate specifically to a particular discipline. In all but one of the 50 states and the District of Columbia, the examinations are standardized by the National Council of Engineering Examiners. Professional engineers are expected to practice only in the engineering disciplines in which they are competent.

surveyor certify that the *azimuth* of the directional antenna is "in the proper orientation." We expect that at the time surveying services are either arranged for or provided, the surveyor will be provided with the information necessary to determine the relationship between the antenna's main lobe and its mechanical construction. We believe this dual certification process will be responsive to both NAB's and JAB's concerns.

Issue 11: Whether the Commission should adopt more rigorous rules relating to physical deterioration or maintenance of directional antennas

49. NAB asserts that the Commission should address protection to FM stations from interference stemming from antenna system deterioration. ABES also states that more rigorous antenna installation standards are needed, and that pre-installation and post-installation procedures intended to insure the proper operation of directional antennas should be adopted. ABES concludes that the directional antenna performance and certification requirements specified in Section 73.316 of the rules will not insure that the operation of a directional antenna complies with the theoretical design. ABES thus suggests that periodic checks, such as at renewal time, should be required to show that no change has taken place in the antenna or in the immediate environment in which it operates.

50. In the *Report*, we found no apparent need for such changes in the policies and rules governing directional antenna performance at this time. We stated that existing requirements would be sufficient, for the most part, but added a number of requirements in Section 73.316(c) to further ensure that the predicted directional performance will be realized and maintained. We will also continue to require proofs of performance to establish that directional antennas have acceptable measured patterns. NAB and ABES do not provide us with information necessary to improve upon the current requirements. However, this matter may be explored further in a future directional antenna rule making. Until then, we believe the current provisions will be sufficient.

Issue 12: Whether the Commission should permit short-spacing in Puerto Rico and the Virgin Islands

51. dLR also notes that the Commission's rules, for several years, have permitted greater facilities for FM stations in Puerto Rico and the Virgin Islands per Section 73.211(b)(3). As a result, many of these stations currently generate signal overlap of the protected service contours specified in the new Section 73.215. Because of the unique topography and the maximum permitted facilities in the islands, dLR request that the procedures applicable to this area be clearly defined.

52. The *Report* did not address this matter. We now conclude that stations in Puerto Rico and the Virgin Islands that may wish to short-space their antenna sites may do so by applying the protection method set forth in the grandfather provisions of Section 73.213. Thus, Section 73.215 is amended to allow these stations to short-space their locations provided the predicted distance to the 1 mV/m field strength contour is not extended toward the 1 mV/m field strength contour of any short-spaced station.

Issue 13: Other requested clarifications

53. Mullaney requests clarification as to how non-commercial stations operating on channels 218, 219, and 220, are to be protected from short-spaced commercial assignments on Channel 221 and above. We note that non-commercial licensees operate on these channels on a contour protection basis, and are required to afford maximum protection to adjacent channel commercial station licensees. Thus, in keeping with current assignment practice, we wish to make clear that adjacent channel commercial stations should base the protection afforded non-commercial stations on their actual facilities since this is the level of protection that they receive from other non-commercial stations.

54. dLR notes that many existing short-spacings occurred after November 1964, and therefore, are not covered under Section 73.213 of the Rules. dLR suggests that it is not clear to what extent and under what conditions those facilities may be short-spaced. Such short-spaced stations with existing overlap with another FM station may also seek modifications pursuant to Section 73.215. While the directional antenna provisions are primarily intended to maximize protection to the service of the non-encroaching station, we see no reason why existing short-spaced licensees seeking to relocate to another similarly short-spaced site should forfeit service already established in directions where some overlap exists. Therefore, we will permit such facility re-location provided the current overlap is not increased.

REGULATORY FLEXIBILITY ANALYSIS

55. In accordance with the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), a regulatory flexibility analysis follows:

I. Need and purpose of this action:

The Commission reaffirms that to provide applicants in the FM Broadcast Service with greater flexibility in the selection of transmitter/antenna sites, it will allow routine short-spaced station assignments, provided appropriate technical measures are taken, *i.e.*, the use of a directional antenna system or reduction in transmitter output facilities. In some cases, this action will permit the installation of facilities that would not be possible because of the lack of available sites at fully spaced locations. This will also permit them to more precisely locate their signal coverage over areas of greater demographic interest.

II. Summary of Issues Raised by Public Comment in Response to the Final Regulatory Flexibility Analysis:

None of the petitions for reconsideration or comments filed in response thereto addressed the Final Regulatory Flexibility Analysis presented in the *Second Report and Order*.

III. Significant Alternatives Considered and Rejected:

The only significant alternative would be to return to the process of granting waivers of the FM station distance separation requirements. This alternative was not chosen because no protection would be afforded short-spaced stations and because of the administrative inconvenience in reaching a decision that such waivers were in the public interest.

56. The Secretary shall send a copy of this Report, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

57. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, and has been found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

58. Accordingly, IT IS ORDERED THAT the Petitions for Reconsideration ARE GRANTED to the extent indicated above and ARE DENIED in all other respects. IT IS FURTHER ORDERED THAT, pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303, and effective **November 1, 1991,** Part 73 of the Commission's Rules IS AMENDED as set forth below in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2.47 CFR Section 73.207 is amended by revising paragraph (a) to read as follows:

Section 73.207 Minimum distance separation between stations.

(a) Except for assignments made pursuant to Section 73.213 or Section 73.215, FM allotments and assignments must be separated from other allotments and assignments on the same channel (co-channel) and five pairs of adjacent channels by not less than the minimum distances specified in paragraphs (b) and (c) of this section. The Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation requirements of this section. The Commission will not accept applications for new stations, or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section, or such applications conform to the requirements of Section 73.213 or Section 73.215. However, applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency. Class D (secondary) assignments are subject only to the distance separation requirements contained in paragraph (b)(3) of this section. (See Section 73.512 for rules governing the channel and location of Class D (secondary) assignments.)

* * * * *

3. 47 CFR 73.215 is amended by revising paragraph (a)(2), adding paragraph (a)(4), and revising paragraph (e) to read as follows:

Section 73.215 Contour protection for short-spaced assignments.

(a) * * *

(2) The interfering contours, for the purpose of this section, are defined as follows. For co-channel stations, the F(50,10) field strength along the interfering contour is 20 dB lower than the F(50,50) field strength along the protected contour for which overlap is prohibited. For first adjacent channel stations (+200 kHz), the F(50,10) field strength along the interfering contour is 6 dB lower than the F(50,50) field strength along the protected contour for which overlap is prohibited. For both second and third adjacent channel stations (+400 kHz and +600 kHz), the F(50,10) field strength along the interfering contour is 40 dB higher than the F(50,50) field strength along the protected contour for which overlap is prohibited.

* * * * *

(4) Stations in Puerto Rico and the Virgin Islands may submit application for short-spaced locations provided the predicted distance to their 1 mV/m field strength contour is not extended toward the 1 mV/m field strength contour of any short-spaced station.

* * * * *

(e) The Commission will not accept applications that specify a short-spaced antenna location for which the following minimum distance separation requirements, in kilometers (miles), are not met:

Relation	Co-Channel	200 kHz	400/600 kHz
A to A	92 (57)	49 (30)	29 (18)
A to B1	119 (74)	72 (45)	46 (29)
A to B	143 (89)	96 (60)	67 (42)
A to C3	119 (74)	72 (45)	40 (25)
A to C2	143 (89)	89 (55)	53 (33)
A to C1	178 (111)	111 (69)	73 (45)
A to C	203 (126)	142 (88)	93 (58)
B1 to B1	143 (89)	96 (60)	48 (30)
B1 to B	178 (111)	114 (71)	69 (43)
B1 to C3	143 (89)	96 (60)	48 (30)
B1 to C2	175 (109)	114 (71)	55 (34)
B1 to C1	200 (124)	134 (83)	75 (47)
B1 to C	233 (145)	165 (103)	95 (59)
B to B	211 (131)	145 (90)	71 (44)
B to C3	178 (111)	114 (70)	69 (43)
B to C2	211 (131)	145 (90)	71 (44)

B to C1	241 (150)	169 (105)	77 (48)
B to C	270 (168)	195 (121)	105 (65)
C3 to C3	142 (88)	89 (55)	42 (26)
C3 to C2	166 (103)	106 (66)	55 (34)
C3 to C1	200 (124)	133 (83)	75 (47)
C3 to C	226 (140)	165 (103)	95 (59)
C2 to C2	177 (110)	117 (73)	56 (35)
C2 to C1	211 (131)	144 (90)	76 (47)
C2 to C	237 (147)	176 (109)	96 (60)
C1 to C1	224 (139)	158 (98)	79 (49)
C1 to C	249 (155)	188 (117)	105 (65)
C to C	270 (168)	209 (130)	105 (65)

* * * * *

4. 47 CFR 73.316 is amended by revising paragraphs (b), (b)(1), (b)(2) and (c)(8) to read as follows:

Section 73.316 FM antenna systems.

* * * * *

(b) Directional antennas. A directional antenna is an antenna that is designed or altered for the purpose of obtaining a non-circular radiation pattern.

(1) Applications for the use of directional antennas that propose a ratio of maximum to minimum radiation in the horizontal plane of more than 15 dB will not be accepted.

(2) Directional antennas used to protect short-spaced stations pursuant to Section 73.213 or Section 73.215 of the rules, that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized.

(c)* * *

(8) In the case of applications for license upon completion of antenna construction, a statement from an engineer (as well as a statement of the engineer's qualifications) that the antenna has been installed pursuant to the manufacturer's instructions and a statement from a licensed surveyor that the antenna is installed in the proper orientation.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CHICAGO MDS COMPANY — File No. 60122-CM-TC-91

For consent to transfer control of Station WHT562 in Chicago, Illinois, from Graphic Scanning Corporation to James E. Lindstrom

ORDER

Adopted: September 6, 1991; Released: September 16, 1991

By the Chief, Domestic Radio Branch:

1. On June 20, 1991, Chicago MDS Company (Chicago MDS) filed an application for consent to transfer control of the 50% partner of Chicago MDS from Graphic Scanning Corporation (Graphic) to James E. Lindstrom (Lindstrom). If this application is granted, Lindstrom would acquire all of the issued and outstanding stock of Graphic's wholly-owned subsidiary, Broadcast Data Corporation (BDC). The captioned application was placed on public notice on July 31, 1991 (Report No. D-602, Mimeo No. 14151).

2. On August 8, 1991, Danjon, Inc. (Danjon) filed a Petition to Dismiss or to Hold in Abeyance. Danjon's grounds for its petition are that Station WHT562 is the subject of a pending application for renewal (File No. 57962-CM-R-91), against which Danjon has also filed a petition to deny. [1]

3. Pursuant to their "Consent Motion for Conditional Grant of Transfer Application," filed August 21, 1991, the parties have agreed that a grant of the Chicago MDS transfer application would be in the public interest, provided that any such grant be expressly conditioned upon the Commission's disposition of the Chicago MDS renewal application.

4. On the basis of the parties' agreement, we find that the public interest would be served by a grant of the Chicago MDS transfer of control application subject to the referenced condition.

5. Accordingly, IT IS HEREBY ORDERED, that Danjon's Petition to Dismiss or to Hold in Abeyance IS DISMISSED;

6. IT IS FURTHER ORDERED that the application, File No. 60122-CM-TC-91, for consent to transfer control of Broadcast Data Corporation, the 50% partner of Chicago MDS Company, from Graphic Scanning to James E. Lindstrom, IS GRANTED, SUBJECT TO AND CONDITIONED UPON the Commission's disposition of Danjon's petition to deny the pending renewal application for Station WHT562 (File No. 57962-CM-R-91), and subject to and conditioned upon such action as the Commission may take with respect to the renewal application.

FEDERAL COMMUNICATIONS COMMISSION

Robert James, Chief
Domestic Radio Branch

[1] Danjon petitions to deny the renewal application on the grounds that, pursuant to Section 21.914 of the Rules, the renewal application was untimely filed in that Chicago MDS had not filed its renewal application on the same calendar day as Danjon's March 4, 1991 application for a new license for the same frequency.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-160

In the Matter of

Amendment of Section 73.202(b), RM-7718
Table of Allotments,
FM Broadcast Stations.
(Sterling, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 4, 1991; Released: September 16, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 3525 (1991), issued in response to a petition filed by Early Williams ("petitioner"). The *Notice* proposed the allotment of Channel 239A to Sterling, Kansas, as that community's first local broadcast service. Petitioner filed comments reaffirming his interest in the allotment of Channel 239A at Sterling. Great Plains Communications ("Great Plains") filed a counterproposal. Great Plains' counterproposal is unacceptable for consideration. [1]

2. We believe the public interest would be served by allotting Channel 239A to Sterling, Kansas, as it will provide the community with its first local service. Channel 239A can be allotted to Sterling, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 4.6 kilometers (2.9 miles) southwest of the community. [2] The site restriction will prevent a shortspacing to Station KQNS-FM, Channel 240A, Lindsborg, Kansas.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 28, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Sterling, Kansas	239A

4. IT IS FURTHER ORDERED, That the counterproposal filed by Great Plains Communications IS DISMISSED.

5. The window period for filing applications for Channel 239A, Sterling, Kansas will open on **October 29, 1991**, and close on **November 29, 1991**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Great Plains counterproposed the allotment of Channel 239A to Haven, Kansas, and Channel 241A to Sterling, Kansas. The allotment of Channel 239A at Haven requires the substitution of Channel 235C1 for Channel 236C1, Station KICT(FM), Wichita, Kansas, Channel 295C2 for vacant Channel 232A, Kingman, Kansas, and Channel 273A for Channel 295C1, Station KYSG, Larned, Kansas. The counterproposal is unacceptable because Great Plains proposes to substitute a Class A channel at Larned instead of a Class C1 channel. Station KYSG, Channel 295A, was upgraded to Channel 295C1 in MM Docket 90-390. *See* 5 FCC Rcd 7462 (1990). Furthermore, Great Plains proposes to substitute Channel 295C2 for Channel 232A, Kingman, although no interest has been expressed in a Class C2 channel at Kingman. For the above reasons, Great Plains' counterproposal will be dismissed.

[2] The coordinates for Channel 239A at Sterling are 38-10-56 and 98-14-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-267

In the Matter of

Amendment of Section 73.606(b), RM-7785
Table of Allotments,
TV Broadcast Stations.
(Kennett, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 3, 1991; Released: September 16, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by New Life Evangelistic Center, Inc. ("petitioner"), requesting the allotment of UHF Television Channel 58 to Kennett, Missouri, as that community's first local television service. Petitioner provides information in support of the proposal and states its intention to apply for the channel, if allotted.

2. Kennett (population 10,145), [1] seat of Dunklin County (population 36,324), is located in southeastern Missouri approximately 265 kilometers (165 miles) south of St. Louis, Missouri.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 58 can be allotted to Kennett consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules, provided there is a site restriction 15.1 kilometers (9.4 miles) south of the community. [2] The site restriction is required to avoid the freeze area of St. Louis, Missouri.[3] The proposed allotment of Channel 58 to Kennett will also require a plus offset.[4]

4. We believe the public interest would be served by proposing the allotment of Channel 58 to Kennett, Missouri, since it could provide the community with its first local TV service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Kennett, Missouri	---	58+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John H. Midlen, Jr.
Gregory H. Guillot
Midlen & Guillot, Chartered
3238 Prospect Street, N.W
Washington, D.C. 20007-33214

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

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[1] Population figures are from the 1980 U.S. Census.

[2] The coordinates for Channel 58 at Kennett are 36-06-09 and 90-02-25.

[3] The Commission has imposed a freeze on new television allotments in certain metropolitan areas. *See Notice of Inquiry,* 2 FCC Rcd 2125 (1987) and *Order,* 52 FR 28346, July 29, 1987.

[4] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin,* 3 FCC Rcd 6765 n. 1 (1988).

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-268

In the Matter of

Amendment of Section 73.202(b), RM-7790
Table of Allotments,
FM Broadcast Stations.
(Fort Kent, Maine)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 5, 1991; Released: September 16, 1991

Comment Date: November 4, 1991
Reply Comment Date: November 19, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by the University of Maine System ("petitioner"), requesting the allotment of Channel 293C3 to Fort Kent, Maine, and its reservation for noncommercial educational use. [1] Petitioner submitted an engineering analysis in support of the proposal and states its intention to apply for the channel, if allotted.

2. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. According to petitioner, there are no noncommercial educational channels available for use at Fort Kent because of the required protection to Canadian allotments in Quebec and New Brunswick. Furthermore, petitioner notes that although the U.S./Canadian Working Arrangement does not expressly require protection of Channel 6 Television Stations, Station CHSJ-6, Bon Accord, New Brunswick, has substantial viewership in Fort Kent and is one of only three off-the-air English language signals available in the community. Petitioner maintains that the public interest would not be served through operation on a channel in the noncommercial educational FM band that would deprive Fort Kent residents of television programming on which they depend and which they are otherwise unable to receive off-the-air.

3. We believe the public interest would be served by proposing to allot Channel *293C3 to Fort Kent, Maine, and to reserve the channel for noncommercial educational use. Our review of petitioner's proposal confirms that Channel *293C3 can be allotted to Fort Kent in compliance with the Commission's minimum distance separation requirements with a site restriction 2.5 kilometers (1.6 miles) east of the community.[2] Our study also shows that the allotment would be short-spaced to Channel 296C, Station CIBM-FM, Riviere-Du-Loup, Quebec, Canada. We will request concurrence from the Canadian government for the allotment of Channel *293C3 at Fort Kent as a specially negotiated short-spaced allotment. We note, however, that Channel 293C3 is the only class C3 Channel that can be allotted to Fort Kent. Any expressions of interest for the use of the channel as a commercial facility should be made during the comment period.

4. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Fort Kent, Maine	---	*293C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 4, 1991,** and reply comments on or before **November 19, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Todd D. Gray
Margaret L. Miller
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Suite 500
Washington, D.C. 20037

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are

[1] Petitioner currently operates five noncommercial educational radio stations and four noncommercial educational television stations. Petitioner had an application on file for Channel 203 at Fort Kent (BPED-891215MC) which was returned because of short spacing to a Canadian proposal.

[2] The coordinates for Channel *293C3 are 47-15-30 and 68-33-30. The site restriction will enable the Commission to request concurrence from Canada for the allotment of Channel 293C3 at Fort Kent as an unlimited short-spaced allotment.

advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Application of

EVANSVILLE SKYWAVE, INC. File No. BPH-870430OK

For Construction Permit for
New FM Station, Channel 298A,
Evansville, Indiana

Appearances

Donald J. Evans, on behalf of Evansville Skywave, Inc.; and *Y. Paulette Laden*, on behalf of the Mass Media Bureau.

DECISION

Adopted: September 6, 1991; Released: September 18, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN. Board Member BLUMENTHAL:

1. Before the Review Board is the *Initial Decision*, 6 FCC Rcd 1356 (1991)(*I.D.*), of Administrative Law Judge Edward J. Kuhlmann (ALJ) denying the sole remaining application of Evansville Skywave, Inc. (Skywave). Skywave filed exceptions to the *I.D.*, and the Commission's Mass Media Bureau has filed reply exceptions supporting a grant of the Skywave application.

2. The ALJ conducted a hearing on the following basic qualifying issues with respect to Skywave:

> 1. To determine whether Skywave has misrepresented facts that it is a *bona fide* two-tiered stock corporation and/or that Ms. Sondra Matthews is the real party in control of the applicant, and, if so, the effect thereof upon its basic qualifications.
>
> 2. To determine whether Skywave is financially qualified to construct and operate the proposed Evansville, Indiana FM Station.
>
> 3. To determine whether Skywave has misrepresented facts or lacked candor in certifying that it is financially qualified to construct and operate the Evansville station and, if so, to determine the effect thereof upon its basic qualifications.
>
> 4. To determine whether Sondra Matthews or Leon Perkinson misrepresented facts or lacked candor in their deposition testimony and, if so, the effect thereof upon the basic qualifications of Skywave.
>
> 5. To determine in light of the evidence adduced pursuant to the foregoing issues, whether Skywave's application should be granted.

The ALJ resolved adversely all the foregoing issues and concluded that Skywave did not possess the requisite qualifications to be a Commission licensee.

3. Under Issue 1, the ALJ held that Skywave was not and is not a *bona fide* two-tiered corporate applicant. When the Commission has encountered disingenuous applicants in the past, it has been adequate for purposes of resolving that immediate *comparative* case to simply deny ownership/management integration to the discredited applicant, which denial -- in every such case to date -- has sufficed to ensure that the bogus applicant did not acquire the very license or construction permit it had sought. *See, e.g., Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374 (1991); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990). Were this instant case yet a *comparative* proceeding where, if warranted, the mere rejection of Skywave's integration proposal would penalize that applicant by refusing it the highly valuable privilege sought, we might very well have applied that routine template and left it there. But, because this proceeding is not before us in a *comparative* posture,[1] that expedient is not open to the Commission. Therefore, it is necessary to determine whether the ALJ was here correct in finding that Skywave has abused the Commission's processes by the willful submission of a sham ownership structure designed to exploit artifically the Commission's current comparative licensing scheme.[2]

BACKGROUND

4. In brief, the ALJ found Skywave to be indistinguishable from a legion of prior applicants whose purported two-tier ownership structures have been soundly discredited. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3025 n.48 (1990) (and cases cited therein). Thus, the evidence reflects that the driving force behind Skywave's application is its "preferred" (hence nonvoting) stockholder, Skywave Communications Corporation (SCC), which owns fully 75% of Skywave's equity, especially SCC president Lee Perkinson.

5. Skywave's ostensible "sole" common stockholder is Sondra Matthews. As the ALJ reports:

> Ms. Matthews heard that the frequency was available in the spring of 1986 but she took no action to apply. "[S]hortly thereafter" Lee Perkinson, the President of SCC, contacted her by telephone about applying with SCC. Skywave Exh. 1, at 2. Mr. Perkinson told her that the investors in Skywave Communications Corporation would pay for pursuing the application and that they were looking for someone local to participate with them in applying for the Evansville facility. They agreed after several telephone calls to pursue the application. *Id.* Ms. Matthews received 25% of the equity and SCC 75%.

I.D. at para. 7. Matthews has contributed only $1,000 for her 25% equity share in Skywave, *id.*, para. 32, and Skywave's prosecution expenses have all been paid out of a separate bank account funded and guaranteed by SCC's Perkinson. Tr. 251-252. So far as the record shows, Matthews will contribute no further funding for her equity share or towards the construction and initial operation of the proposed Skywave station.

6. The record further reflects as follows. Perkinson (and/or SCC) have applied for FM radio station construction permits in at least 10 other markets using the two-tiered corporation format; in 9 out of those 10, SCC also claimed a 75% equity interest and sought to find a "local" individual to assume for it the role of the exclusive and "controlling" common stockholder. *See* Tr. 265-266. In this Evansville proceeding, and long before SCC had recruited its (then unknown) local participant, Perkinson retained communications engineer Richard Biby to do its pre-filing technical studies. Tr. 239. Later, "passive" Skywave principal Perkinson sought to enlist a certain Marion Hite, "a personnel person at Defense Hospital" (Tr. 224)(Matthews testimony), as its local principal, though at hearing Perkinson could not even "remember how I got Marion Hite's name." Tr. 264. While Hite declined, she passed along Matthews' name to Perkinson. On the basis of a single April 1987 meeting with Perkinson before this Skywave application was filed, Matthews was ceded her 25% equity interest in Skywave and ostensibly made the corporation's only voting shareholder. Tr. 178. Matthews did not negotiate her equity share and she met none of the other SCC shareholders, nor they her, prior to her fortuitous selection, with perhaps one exception.

7. That one exception appears to have been Philip Kappes, Esq., another "passive" SCC shareholder who had performed legal work on several prior SCC applications. Tr. 232-233. Kappes is corporate counsel to SCC. Tr. 234. That single pre-filing meeting between Perkinson and Matthews occurred at the office of Kappes, who had already prepared Skywave's corporate documents at Perkinson's prior direction. Tr. 230. Another "passive" SCC shareholder is Douglas McFadden, whose law firm represents Skywave in this proceeding, just as it has represented other SCC applicants. Although Matthews claimed at hearing that *she* had hired Skywave's attorneys and engineers, Tr. 181, her earlier deposition testimony had declared that she herself had *not* retained Skywave's technical and legal professionals. Tr. 180-188.[3] At the same time, however, Matthews admitted that she never made any fee or payment arrangements with those professionals she now claims to have hired. Tr. 188-191. Moreover, while Matthews contended that she had personally acquired Skywave's transmitter site, she actually provided the (assumed) site owners with a form letter prepared by Perkinson, which she mailed back to Perkinson immediately after it was signed. Tr. 208-209. She did not know why she had referred the letter back to Perkinson. But, several months thereafter, and without ever discussing the matter with Matthews, Perkinson, on his own, sought and obtained a revised Skywave site letter. Tr. 210-211 (Matthews testimony); Tr. 267-268 (Perkinson testimony).[4]

8. Matthews personally certified Skywave's application as to its financial ability, and claimed that she had "arranged" a loan of up to $400,000 from Bank One, Indianapolis, Indiana. *See I.D.*, para. 16.[5] She did so, she testified, by phoning a bank loan officer unknown to her, Anthony P. Schlichte, upon Perkinson's recommendation. Tr. 215. Schlichte had previously provided "reasonable assurance" letters for other SCC applications. Tr. 260; *see also supra* note 2. Though Matthews testified at hearing that she had supplied Bank One with personal financial information before receiving the bank's original loan assurance, Tr. 260-261,[6] Schlichte testified that he did not know Matthews and could not recall receiving any specific information from Skywave for this particular broadcast application, Tr. 288-289, but he nonetheless issued a letter of April 27, 1987 indicating a "willingness" to consider a loan of up to $400,000 based upon his stated familiarity with several "passive" SCC principals. Tr. 287. And, although Skywave submitted no formal loan application to Bank One in connection with its anticipated financing, Tr. 285; 288, Schlichte "was comfortable in indicating a willingness to look at this financing." Tr. 288. He could not say that Bank One had made a loan "commitment" to Skywave (Tr. 292; emphasis added):

> because we have not received the final loan application with *all of the detailed listing on who's the owners and that kind of thing*, so I don't know that I would characterize [the letter] as an accommodation.
>
> I think [the letter] tries to set forth that upon favorable review of financial information, we most likely would be able to loan the money to this entity.

9. Finally, under Article V of the Skywave Articles of Incorporation, Perkinson and the other SCC preferred shareholders, after May 1, 1993, could have compelled Skywave to purchase their 75% equity interest for fair market value. If Skywave (hence Matthews) were unable to make that cash purchase, the preferred stock would be convertible *immediately* to common stock, thus giving SCC clear voting control of Skywave. Mass Media Bureau Exh. 3 at 178-179; *see also I.D.*, para. 6.[7] Thus, Matthews' tenure as Skywave's sole voting stockholder could have been rather evanescent, since it is entirely speculative as to whether Matthews would or *could* have forefended the conversion of SCC's nonvoting stock; and, therefore, SCC control of Skywave. Indeed, so apparently impecunious was Matthews at the time of application that she borrowed part of her $1000 capital contribution from her mother and her two sisters. *I.D.*, para. 32. [8]

DISCUSSION

10. In a number of prior cases where the Board has rejected sham two-tiered ownership structures, it has declared that *but for* the fact that the discredited applicant did not prevail *comparatively* in that particular case it would have remanded the proceeding on a disqualifying character issue to determine further that applicant's basic fitness for licenseeship. *See, e.g., Carta Corp.*, 5 FCC Rcd 3696, 3705 n.13 (Rev. Bd. 1990), *review dismissed sub nom. Fresno FM Limited Partnership*, 5 FCC Rcd 7261; *Marlin Broadcasting of Central Florida*, 4 FCC Rcd 7945, 7957 n.18 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 5751 (1990), *recon. dismissed*, 5 FCC Rcd 7446 (1990).

11. In *Carta Corp.*, where we found that the record evidence would have otherwise required a basic character issue against a discredited applicant, we took note of the Commission's *Notice of Inquiry*, Docket No. 81-742, 3 FCC Rcd 5179, 5183 (1988), in which it announced the measures of a new campaign to thwart "[s]ham proposals artificially structured simply to appeal to the regulatory process,"[9] and we there stated:

> The Commission has recently expressed deep concern about sham applications and abuse of process in connection with its licensing processes, and the facts of this [*Carta Corp.*] case . . . suggest a pattern within the ambit of those concerns.

Likewise, when the Commission has been presented with a *prima facie* case of a disingenuous ownership structure, it has immediately designated basic qualifying issues to determine whether the subject applicant's "organizational structure is a sham." *See, e.g., Kansas Broadcast Limited Partnership*, 4 FCC Rcd 4640, 4641 (1989). In the case at bar, Issue 1 added by the ALJ served the identical purpose with respect to Skywave's (depicted) ownership structure.

12. On the facts before us, we must find that Skywave is no less a sham than comparable applicants routed in many prior cases. For example, as in *Metroplex Communications, supra, Poughkeepsie Broadcasting Limited, supra*, and *Carta Corp.*, as well as in the more recent *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314 (Rev. Bd. 1990), the ALJ was here confronted by a coterie of application entrepreneurs claiming to be merely "passive" investors, and who had purportedly placed *exclusive* control of their applicant entity in the hands of a virtual stranger, one with little or no palpable stake in that application, economic or otherwise. In this case, typical of the breed, the allegedly "passive" investors supplied all of the capital, utilized its regular engineers and lawyers, pre-prepared the corporate documents (with a prearranged equity split), whereas the supposedly "active" principal was left with little or no operational function other than those purely *post hoc* ministerial acts associated with certifying the application on behalf of the "passive" entrepreneurs. But in an exaggerated effort to claim that Matthews "controlled" Skywave, Perkinson's stage directions at their first and only pre-filing meeting furnish additional proof of an obvious hoax. At that meeting, Perkinson suggested that Matthews "employ" the engineering firm of Richard Biby, SCC's engineer who had already worked on the Evansville project. Matthews then called Biby from Kappes' conference room, Tr. 183-184; 187-1988, but she never asked him about costs or fees. Tr. 190. As to Skywave's corporate and communications counsel, Matthews could only say that "I *felt* that they had become our attorneys when I met them at that place [Kappes' office] when we were introduced to each other," Tr. 180-181, but again she did not inquire about legal fees or payment. Tr. 188-190. Yet, in conflict with her own deposition, Matthews insists that *she* hired Skywave's professionals. *See* Tr. 180-190. The same is essentially true of Matthews' claim to have "arranged" Skywave's bank $400,000 loan. Tr. 214-216. And, in an elaborate charade to further portray Matthews as Skywave's true steward, Matthews claimed to have written, on behalf of Skywave (though at *Perkinson's* suggestion), a letter (undated) to SCC advising Perkinson that Skywave would reimburse SCC for Biby's engineering fees. Tr. 191-195. Apart from the fact that all of Skywave's funds came from SCC in the first place, this "reimbursement" letter was actually written by *Perkinson* himself, then sent to Matthews, who in turn signed it and sent it right back to *Perkinson*. Tr. 243-248. The reason given by Perkinson for this overly elaborate exchange was, he testified, "so that *we* could be reimbursed for those expenses if the application was filed." Tr. 244 (emphasis added). By *whom* ? This farce deceived nobody, least of all Perkinson and Matthews, and certainly not the ALJ.

13. When confronted in *Metroplex* with a similar applicant that had supposedly ceded a 4% equity share *and exclusive control* to a virtual stranger, sole "general" partner Gloria Butler, the Commission soundly affirmed the rejection of that applicant as a sham by the ALJ and the Board:

> It is not credible that a group of experienced investors (including those with past broadcast ownership) would grant exclusive control of their station to a virtual stranger with no broadcast experience, who would make no investment in the station. On the facts before us, we fail to see any legitimate *quid pro quo* by Butler for becoming general partner. We have in the past rejected such instances of "giving away the store" as unworthy of credence. *See KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8 (1985).

5 FCC Rcd at 5612. Much like Gloria Butler in *Metroplex*, Skywave's Sondra Matthews (1) was "selected" after a single brief meeting with only one (or two if Kappes is counted) of the many SCC shareholders; (2) has no broadcast experience; (3) utilized SCC's lawyers and engineers, who had essentially pre-prepared Skywave's application; and (4) has contributed only a token amount for a 25% equity interest in a several hundred thousand dollar broadcast venture.[10] If the *Metroplex* Commission regarded the 4% equity interest and alleged exclusive control ceded to Butler to there be "giving away the store," then this seems plainly an *a fortiori* case. Skywave is likewise a sham. *See also Poughkeepsie Broadcasting Limited*; *Carta Corp.*

CONCLUSION

14. The underlying record supports the holding of the ALJ that the ownership structure projected by Skywave was, as we described in our own decision in *Metroplex*, "a simulacrum intended to exploit artificially the operative mechanics of the Commission's newly relaxed *Attribution of Ownership* policies."[11] We expressly agree with the conclusion of the *I.D.* that, under Issue 1, Skywave has misrepresented that Sondra Matthews was, is, and/or would have been its sole controlling principal. In its Docket No. 81-742, *supra* para. 11, where it decried the burgeoning trend of sham ownership applications, the Commission described such fraudulent applications as indicia of a growing abuse of the Commission's comparative licensing processes. It defined the problem this way:

> The term "abuse of process" is a very broad concept but generally can be defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, *use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule.*

3 FCC Rcd at 5199 n.2 (emphasis added). Considering the evidence before him, we can find no reversible error in the ALJ's conclusion that, under solid Commission

precedent, Skywave was not a *bona fide* two-tiered corporate applicant. Instead, it attempted to callously deploy Sondra Matthews to "subvert[] the underlying intended purpose of [the comparative licensing] process." In light thereof, we cannot find Skywave qualified for the subject construction permit.[12]

15. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Supplement to Exceptions, filed April 8, 1991 by Evansville Skywave, Inc. IS GRANTED; and,

16. IT IS FURTHER ORDERED, That the application of Evansville Skywave, Inc. (File No. BPH-870430OK) for a construction permit for a new FM station on Channel 298A at Evansville, Indiana IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Seven applicants originally applied for the instant frequency. *Hearing Designation Order*, 3 FCC Rcd 5365 (1988). However, by August 15, 1989, Skywave was opposed only by Tri-State Community Development and Communications Corp. As we indicate *infra* note 10, Tri-State and Skywave reached a prehearing settlement, so no current adversary stands before the Board in the path of Skywave.

[2] Because we squarely affirm the ALJ on Issue 1, we find it unnecessary to review the exceptions to the *I. D.* pertaining to Issues 2-4. However, had we not affirmed the *I. D.* on Issue 1, we believe that the record would need critical supplementation on the matter of Skywave's financial qualifications. In that regard, serious questions yet remain as to whether Skywave's purported loan commitment from Bank One, Indianapolis, Indiana, was based upon a mere "accommodation letter" from a (former) loan officer, Anthony P. Schlichte. Indeed, we have remanded a previous case to determine whether Schlichte had there provided an accommodation letter to an applicant also connected with SCC. *See Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6321-22 (Rev. Bd. 1990). Aspects of this issue are briefly discussed in text in connection with our review of the exceptions to Issue 1.

[3] At hearing, Matthews blamed this discrepancy on semantics: "I did *hire* them but I did not *retain* them . . . ." Tr. 188 (emphasis added). But she has never met the engineer, Richard Biby. Tr. 187. And, she could not recall communicating with the engineering firm after Skywave's application was filed Tr. 188.

[4] There is another discrepancy here: though Matthews contended that Perkinson phoned her and asked *her* to secure a new tower site letter, Perkinson denied this to be the case. *Compare* Tr. 211 *with* Tr. 268-269.

[5] Actually, Skywave estimated initial construction and operating costs at only about $200,000, but obtained a Bank One letter indicating a "willingness" to loan as much as $400,000 on this $200,000 project. *I. D.*, para. 16.

[6] There is another discrepancy here: though Matthews contended at hearing that she supplied Bank One with financial information (including personal financial data) in 1987, before receiving the original loan commitment, she had earlier declared that she had supplied the bank with only a "sample [loan] letter"; but, *after* a financial issue had been designated against Skywave, Matthews "sent him my own financial statement" and "arrange[d] for the Skywave investors to send the bank their statements." Skywave Exh. 2 at 2-3. We know not which of Matthews' versions is accurate at this point.

[7] In the wake of Skywave's pending settlement agreement with Tri-Star and Fed City Communications, this stock conversion provision would likely have proven academic, since Fed City would most probably have become the actual licensee long before 1993. *See I. D.*, paras. 4-5.

[8] In addition, Matthews conceded that her own attempts at financing this FM station were unsuccessful. *I. D.*, para. 32.

[9] Although Docket No. 81-742 was directed toward perceived abuses in the *comparative renewal* process, the Commission is certainly no less concerned with identical abuses in the comparative licensing process involving *new* broadcast frequencies, as it plainly indicated in its *Revision of Application for Construction Permit*, 4 FCC Rcd 3853, 3856 (1989). It there stated:

> We have been faced with an increasing number of cases in which real parties-in-interest seek construction permits through "sham" corporate or partnership applicants. In *KIST, Corp.*, for example, we affirmed the Review Board's denial of an integration credit to an applicant where 95% of its stock was held by a minority female. The Board found she was not the true and actual owner for integration purposes. Rather, it found the 5% stockholder, who made a gift of 95% interest in the corporation to the minority female, guaranteed the bank loan and provided $70,000 to prosecute the application, was the real owner for integration purposes. Similarly, integration preferences have been denied in several other cases in which it was determined that an applicant's organizational structure was erected to take advantage of a comparative preference. While the *KIST* 5% shareholder holds an attributable interest and would therefore be identified in a Form 301 application, a 4% shareholder, who need not currently be identified, could easily perpetrate the same scheme. There is the potential for similar abuse in "limited partnership" arrangements. In *Louisiana Super Communications Ltd.*, for example, the Review Board discounted an integrated preference to a female "general" partner where it became evident that the "limited" partner would have complete control over the operation and management of the partnership.

It there highlighted also the hallmarks of a number of previous sham applicants, *e.g.* (*id.*, at 3867 n.41):

> The limited partner contributed 85% of the equity, petitioned the Commission in his own name to have the channel allocated, hired the consulting firm which prepared the application, signed the contracts for equipment and preparation of the application, hired legal counsel, obtained the transmitter site, advised the general partner on all application decisions (which advice was followed in every instance), prepared the financial plan, entered into a bank agreement to provide the financing, and represented the partnership in negotiations with other applicants. *See also Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978) (although integrated general partners claimed an integration credit was warranted, all financing was provided by the third partner; thus, true and actual control rested with that partner); *Payne Communications Inc.*, 1 FCC Rcd 1052, 1058, 1060 (Rev. Bd. 1986) (integration credit denied where limited partner, *inter alia*, employed a research agency to find general partners with favorable qualititative enhancements for his ap-

plication); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988) (limited partner provided 99% of the financing and paid for legal counsel who prepared the application and retained engineering consultant); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4097-98 (Rev. Bd. 1988), *reconsidration granted on other grounds*, 3 FCC Rcd 6216 (Rev. Bd. 1988) (general partners materialized shortly before the application was filed; limited partner held a 90% ownership interest and provided every major element of the application including financing, attorneys and its engineer).

The Skywave application obviously bears many of the foregoing characteristics.

[10] To appreciate the implications of Skywave's claim that Matthews received her 25% equity interest (so far as the record shows) for a mere $1000, we note that Skywave has entered into several settlement agreements. Under its first settlement proposal of August 1989, Skywave would have received $175,000 from a "white knight," Walter Threadgill (d/b/a Fed City Communications, Inc.). I.D., para. 4. Presumably, Matthews would have been entitled to one-quarter of that amount. Under a revised proposal of March 1990, it appears that Skywave might have even received $275,000. Id. While the Board does not rule upon Skywave's current settlement proposal, *see id.*, para. 5, which is contingent upon a reversal of the *I.D.* and a grant of the construction permit to Skywave, and Skywave's settlement negotiations play no role whatever in our affirmation of the *I.D.* under Issue 1, we believe that the settlement figures do nevertheless provide some partial context to the conclusion that this entire Skywave venture represents the precise form of profiteering in construction permit applications that the Commission has recently sought to eradicate. *See Amendment of Section 73.3525 of the Commission Rules*, 6 FCC Rcd 2901 (1991) ("sham applicants will be deterred by limiting . . . settlements to [only] expenses incurred"). Again, we do not pass upon Skywave's pending settlement with Fed City, or seek to vindicate the Commission's most recent settlement policy. We seek merely to place in tangible perspective Skywave's claim that Matthews was all but given a 25% equity share for no perceptible *quid pro quo*. (We also note that the purportedly "passive" SCC president, Lee Perkinson, was involved in the settlement discussions. Tr. 179 (Matthews testimony); *see also* Tr. 231 (Perkinson testimony). Since Matthews was allegely in *complete* control of Skywave by that time, Perkinson's role in the settlement process is quite telling, we do believe.)

[11] *See* 4 FCC Rcd 8149, 8150 (Rev. Bd. 1989).

[12] In going beyond the modest denial of ownership/management *comparative* credit to Skywave to try moreover a basic *qualifying* issue for the deceitful submission of an apparently sham application, the ALJ followed correctly the prescribed formula. *Metroplex Communications, supra*, 4 FCC Rcd at 8161. The Commission has recently assured the court that it intends to implement that formula. Brief For Appellee at 15-16 n.6; 44 n.22. *Southeast Florida Broadcasting Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. filed June 11, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Applications for	File Nos. 10216-CL-P-413-A-88
Review and Petitions for	10187-CL-P-712-A-88
Reconsideration of the	10512-CL-P-459-A-89
Return of Rural Service	10184-CL-P-709-A-88
Area Cellular Applications	
for Having Defective Maps	

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 1991; Released: September 17, 1991

By the Commission:

I. INTRODUCTION

1. Radiophone Corporation (Radiophone), TPF Partnership (TPF), and Western California Cellular Partners (Western) have filed applications for review or seek reconsideration[1] of the actions of the Common Carrier Bureau (Bureau) returning their applications for cellular licenses for Rural Service Areas (RSAs)[2] as unacceptable for filing. The applications were dismissed because of defects in the maps required to be submitted with the applications pursuant to Sections 22.903(a) and 22.923(a) of the Commission's rules. The pleadings all raise similar issues concerning the full-size map requirement. Accordingly, these applications have been consolidated for Commission review. [3] For the reasons set forth below, we find that the RSA rules requiring the submission of a map on a scale of 1:250,000 with the original RSA application do not comply with the notice provisions enunciated in *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985). Therefore, we will reinstate TPF's application. While we also conclude that Radiophone's applications should not have been dismissed for failing to submit a map on a scale of 1:250,000 with its applications, Radiophone's applications fail to contain a firm financial commitment which requires their dismissal. Western's application must also be dismissed because it fails to contain a firm financial commitment.

II. ISSUE ANALYSIS

A. Requirement to File a Map on a Scale of 1:250,000 with the Original Application

1. Radiophone

2. *Background.* Radiophone filed an application seeking review of the Bureau's *Memorandum Opinion and Order*, 5 FCC Rcd 1243 (Com. Car. Bur. 1990), (*Bureau Order*), upholding the Mobile Services Division's (MSD) dismissal of its cellular application for the non-wireline cellular license for RSA Market No. 413, Iowa 2 - Union.[4] In addition, Radiophone filed a petition for reconsideration of the action taken by the MSD returning its application for the non-wireline cellular license for RSA Market No. 712, Wisconsin 5 - Pierce. In both cases, Radiophone's applications were dismissed as defective because they did not include maps using the 1:250,000 scale required by Section 22.903(a) of the Commission's rules.

3. In its petition for reconsideration of the Bureau's dismissal of its Iowa 2 RSA application, Radiophone argued that the Commission's rules do not require that RSA applicants submit a "full-size" map (*i.e.*, a map on a scale of 1:250,000). It claimed that the *Erratum to Further Order on Reconsideration*, 53 Fed. Reg. 28640 (1988), (*Erratum*), deleted from Section 22.923(a)(1) a clause which stated that the full-size map must be present in the original application.[5] Radiophone maintained that, without the language which expressly required the inclusion of a full-size map with the original application, applicants were under no express obligation to submit a 1:250,000 scale map with their paper original application. Citing *Salzer v. FCC*, *supra*, Radiophone argued that given the ambiguity in the Commission's rules, it should not be penalized for not having submitted a full-size map.

4. In denying Radiophone's petition for reconsideration, the Bureau found that Section 22.923(a)(1) and 22.903(a) required submission of a full-size map with the original and paper copies of cellular applications. The Bureau rejected Radiophone's argument that the *Erratum's* deletion of the words "but must be present in the original application" removed the requirement that the full-size map be filed. Citing *REM Communication*, 3 FCC Rcd 3705 (1988), the Bureau concluded that, by not submitting a full-size map with the application, Radiophone's application was defective under Section 22.20 of the rules.

5. *Discussion.* With respect to Radiophone's argument regarding the impact of the *Erratum's* deletion of the phrase "but must be present in the original application" from Section 22.923(a)(1), we rely on the principles of *Salzer v. FCC*.[6] Under *Salzer*, elementary fairness compels explicit notice of all application requirements. As the severity of the Commission's sanctions increase, so must the precision and clarity of the Commission's requirements.[7] The penalty for failure to file a full-size map with the original application application is dismissal of the application pursuant to Section 22.20 of the the rules.[8] Under *Salzer*, therefore, it is imperative that the rules and any associated pronouncements governing the submission of a full size map be clear. While we agree with the Bureau that Section 22.903(a)(1) taken together with Section 22.923(a) requires applicants to file with its original application a map depicting the CGSA on a scale of 1:250,000, we believe that the *Erratum's* deletion of the phrase, "but must be present in the original application," made the requirement to file a full-size map somewhat ambiguous. Accordingly, we find that the ambiguity created by the *Erratum* denied Radiophone the proper notice that fundamental fairness requires.

6. We would accept Radiophone's submissions of the full-size maps filed as amendments and reinstate its applications if no other fatally defective errors were present. Our review of Radiophone's applications in the context of this proceeding, however, reveals that they should have been dismissed because Radiophone did not demonstrate that it had a firm financial commitment at the time it filed its applications as required by Section 22.917(c)(1) of the rules.[9] Radiophone, which intended to rely on financing obtained through its parent corporation, in its role as a recognized financial institution, relied on its parent's

role as a "recognized funding source," citing *Marcell's Inc.*, FCC 84 M-3390, released August 3 1984 (ALJ).[10] It did not, however, provide the financial information required from recognized financial institutions by Sections 22.917(c)(5). Specifically, Sections 22.917(c)(5)(i)-(v) provide in pertinent part that a non-wireline RSA applicant's firm financial commitment from a recognized financial institution shall contain a statement that the lender's willingness to commit funds is based solely on its relationship with the applicant, that the commitment is not in any way guaranteed by any entity other than the applicant, and that the lender has determined that the applicant is creditworthy. Radiophone's financial commitment letters from Syndicated do not indicate that Syndicated's willingness to enter into the commitment is based solely on its relationship with Radiophone, that the commitment is not in any way guaranteed by any other entity, and does not evidence Syndicated's determination that it has assessed the Radiophone's creditworthiness.[11] Accordingly, Radiophone's applications must be dismissed as unacceptable for filing. *See Amendment of the Commission's Rules for Rural Cellular Service (Fourth Report and Order)*, 4 FCC Rcd 2542, 2545 (1988) (defective financial showing will lead to dismissal); *REM Communication*, *supra* (defective application cannot be amended).

7. In addition, even if Radiophone's financial showing were treated as relying on internal financing, its showings were defective for failure to submit certified audited financial statements, current balance sheets and certifications regarding the balance sheets. *See* 47 C.F.R. §§ 22.917(c)(6),(c)(7).

2. TPF

8. *Background*. TPF Partnership (TPF) seeks reconsideration of the return of its application for the non-wireline cellular license for RSA Market No. 459, Louisiana 6 - Iberville. TPF filed the original and hard copies of its application on July 31, 1989. On August 17, 1989, TPF filed an amendment to its application which included both a full-size 1:250,000 scale map and a request for a waiver of the seven-day post-lottery filing period for submission of that map. On March 19, 1990, the MSD dismissed TPF's application as defective for failure to include the correct full-size map in the original, hard-copy application. The MSD also denied TPF's request for a waiver.

9. TPF claims that the microfiche version of its application complied with the Commission's initial filing requirements by including an 8 1/2 by 11 inch reduced copy of a map, which depicted its proposed CGSA in the Louisiana 6 RSA and the contours of its single proposed cell site.[12] TPF explains that due to a clerical error by its engineering firm, the 1:250,000 scale full-size map submitted with its July 31, 1989 filing inadvertently depicted an additional cell site that was not included in the microfiche or the reduced copy of the map in its paper application. TPF asserts that, once it discovered the error, it submitted a corrected full-size map as an amendment to its application on August 17, 1989. In addition, it requested a waiver of the seven day rule.

10. *Discussion*. Except for the additional cell depicted in the paper copy of its full-size map, TPF's application fully complied with our RSA rules. However, we need not resolve the relative merits of TPF's assertions that its error does not warrant dismissal of its application. As discussed above, the *Erratum*'s deletion of language expressly indicating that the full-size map must be present in the original application made the requirement of submission of such a map ambiguous. While TPF did not claim that the error in its full-size map stems directly from reliance on the *Erratum*, we need not place TPF in a worse position than had it submitted no full-size map at all. Therefore, TPF's failure to submit the correct full-size map with its paper application should not result in the dismissal of its application. Accordingly, we will accept TPF's amendment to its full-size map and reinstate its application.[13]

B. Failure to Include a Legend with the Maps

1. Western

11. *Background*. Western seeks Commission review of the Bureau's *Memorandum Opinion and Order*, 5 FCC Rcd 2932 (Com. Car. Bur. 1990), (*Bureau Order)*, upholding the MSD's dismissal of Western's application for the non-wireline cellular license for RSA Market No. 709, Wisconsin 2 - Bayfield, Wisconsin.[14] On March 24, 1989, Western filed its original application and two paper copies, including a map of its proposed CGSA, drawn on a scale of 1:500,000. The MSD subsequently dismissed Western's application as defective because: (1) Western failed to submit the proper full size 1:250,000 map required by Sections 22.903(a)(1) and 22.923(a)(1) of the rules; and (2) the map failed to provide a scale of statute miles and a legend explaining the 39 dBu and the CGSA contours.

12. Western filed a petition for reconsideration of the *Bureau Order* which included a map drawn on a 1:250,000 scale with a legend and scale. Western argued that it should be allowed to amend its application by remedying the defect in the scale of the map and the map legend. Alternatively, Western argued that it should be granted a waiver of the Commission's rules.

13. On reconsideration, the Bureau found that Western's submission of a 1:500,000 scale map could have been corrected by minor amendment, and because the map submitted contained a scale on its face, it was not *per se* defective. However, the map failed to identify where the proposed CGSA and 39 dBu contours lie, which were fatal defects. Citing *REM Communication*, 3 FCC Rcd at 3705, the Bureau concluded that Western's map was unusable and therefore was properly dismissed as unacceptable for filing. The Bureau also rejected Western's waiver request.

14. *Discussion*. For reasons similar to our decision to permit TPF to submit a correct version of its full-size map, we would also permit Western to submit a correct full-size map. However, at the time that Western filed its application, it did not demonstrate that it had a firm financial commitment for funds upon which it could rely to construct and operate its proposed cellular system for one year, as required by Section 22.917(c)(1) of the rules.[15] When Western filed its application, on September 2, 1988, it relied on a financial commitment letter from Brad Peery, Inc. (Peery).[16] The letter from Peery describes Peery as "an investment banking firm specializing in the telecommunications industry." The first paragraph of the letter states that Peery will fund Western's cellular proposal up to $2,000,000 over a period of up to five years. The second paragraph lists the relevant terms of financing. One of the terms is that Western will obtain equipment vendor financing up to $1,500,000. In *Progressive*

Cellular, 5 FCC Rcd 2772 (1990), *recon. pending*, where the non-wireline applicant for an RSA market relied on a similar Peery letter, the Commission found that the letter did not constitute a firm financial commitment because the applicant was required to obtain vendor financing as a condition precedent to Peery's commitment to provide funds. The Commission concluded that because the applicant did not obtain the vendor financing prior to filing its application and did not include evidence that such financing had been obtained at the time its application was filed, its application was unacceptable for filing and was properly dismissed. By identical terms in the Peery letter associated with Western's application, Western must obtain vendor financing from a third party before it receives the Peery financial commitment. Because Western did not include in its application evidence of that financing,[17] its application is unacceptable for filing. Thus, Western's application is defective and will be dismissed.

III. CONCLUSION

15. In this Order, we have determined that while the Commission's rules governing the submission of RSA maps are otherwise clear, the 1988 *Erratum*, which deleted a clause expressly requiring the inclusion of a 1:250,000 scale map with the original RSA application, rendered that portion of the rules requiring the submission of a full-size map ambiguous. In that failure to submit a full-size map with the application would result in the dismissal of the application, we find that the ambiguity in the Commission's RSA map rules created by the *Erratum* warrants reversal of the dismissal of TPF's application. With respect to Radiophone, however, we find that its applications are defective because they failed to include the firm financial commitment required by Section 22.917(c) of our rules. As to Western, we conclude that its application is also defective for failure to include a firm financial commitment at the time of filing as required by Section 22.917(c)(1) of our rules. Accordingly, we are dismissing Radiophone's and Western's applications and reinstating TPF's application.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED THAT the Applications for Review filed by Radiophone Corporation and Western California Cellular Partners and the Petition for Reconsideration filed by Radiophone Corporation ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

17. IT IS FURTHER ORDERED THAT the MSD's dismissals of Radiophone's applications and Western's application ARE AFFIRMED for the reasons set forth herein.

18. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by TPF Partnership IS GRANTED.

19. IT IS FURTHER ORDERED THAT the application of TPF Partnership, File No. 10512-CL-P-459-A-89, IS REINSTATED *nunc pro tunc*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

In the *Further Order on Reconsideration*, 53 Fed. Reg. 18562, 18564-18565 (May 24, 1988), 64 Rad. Reg. 2d (P&F) 1360 (1988), in which Section 22.923 was first adopted, the rule stated in part:

> (a) Applications for new stations or for modified facilities increasing the Cellular Geographic Service Area of existing stations shall be filed on FCC Form 401. The following exhibits shall be attached to any such application:
>
> (1) An exhibit including a map or maps of the cellular system's existing Cellular Geographic Service Area, if any, and the Cellular Geographic Service Area proposed in the application. This exhibit shall contain all the information specified in Section 22.903(a). In addition, this shall include an 8 1/2 by 11 inch reduced copy of the 1:250,000 scale map [required by Section 22.903(a)]. The full-size map need not be included in the microfiche copies of the application[, but must be present in the original application] from which the microfiche is made. For microfiching purposes, the reduced map is sufficient.
>
> (Language in the foregoing passage which was deleted by the *Erratum* has been enclosed in brackets. Language added by the *Erratum* is underlined in the following text of the present rule section.)
>
> (a) * * *
>
> (1) . . . In addition, this *exhibit* shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 *or 1:500,000 scale map, depicting the complete RSA and any CGSA (s) therein. Boundaries of the RSA, CGSA(s), and 39 dBu contours must be clearly indicated.* The full-size map need not be included in the microfiche copies of the application from which the microfiche is made. For microfiching purposes, the reduced map is sufficient.

FOOTNOTES

[1] The petitions for reconsideration have been referred to the Commission under Section 1.106 of the the rules in order to expedite a final decision on the matters raised.

[2] Radiophone Corporation (File Nos. 10216-CL-P-413-A-88 and 10187-CL-P-712-A-88); TPF Partnership (File No. 10512-CL-P-459-A-89); and Western California Cellular Partners (File No. 10184-CL-P-709-A-88).

[3] In addition to the initial set of pleadings that were filed, numerous other pleadings (motions, supplements, etc.) were filed by the parties. Because of the nature of the arguments involved, we accept the additional pleadings filed by the parties.

[4] At same time that it filed its application for review, Radiophone filed a motion requesting a stay of the non-wireline lottery for market 413, pending final review of the dismissal of its application. By *Memorandum Opinion and Order*, 5 FCC Rcd 3507 (Mob. Serv. Div. 1990), the MSD denied Radiophone's request for stay, finding that Radiophone had failed to make a sufficient showing to justify the extraordinary relief that it was seeking and had failed to demonstrate that it would suffer irreparable harm.

[5] *See* Appendix A thereto.

[6] Radiophone now contends for the first time that the Bureau may not dismiss its RSA applications for failing to file full-size maps because the Commission's RSA map rules do not comply with the Paperwork Reduction Act of 1980 (PRA), Pub. L. No. 96-511, 94 Stat. 2812. OMB has supported Radiophone's contention. We disagree with this argument because the RSA map rule was the same as the MSA map rule and thus not a "substantive or material modification" requiring further OMB approval. In view of our decision herein, however, this issue is now moot.

[7] *Salzer v. FCC*, 778 F.2d at 875.

[8] Section 22.20 states that an application will be unacceptable for filing and returned to the applicant if: 1) the application is defective with respect to completeness of answers to questions, informational showings, execution or other matters of formal character; or 2) the application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

[9] Section 22.917(c)(1) states in pertinent part:

> A non-wireline applicant for a new station shall demonstrate, at the time it files its application, that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year its proposed cellular system.

[10] For purposes of this analysis, we assume without deciding that Radiophone's parent is a recognized financial institution within the meaning of Section 22.917(c)(5) of the rules.

[11] Even though the Commission may recognize the parent of an applicant as a recognized funding source in another context, if the applicant does not comply with the Commission's firm financial commitment requirements, its application will be dismissed. *See* Northeast Cellular Telephone Co. v. F.C.C., 897 F.2d at 1167 and Portland Cellular Partnership, 6 FCC Rcd 2283 (1991).

[12] Under Section 22.6 of the Commission's rules, applications for RSA cellular systems are initially filed in microfiche form, which includes a copy of the 8 1/2 by 11 inch reduced map. Subsequently, pursuant to Section 22.923(b)(2) of the rules, the applicant selected in the lottery must provide, within seven days of the public notice announcing the lottery results, the original and two paper copies of the application. The paper application must include both an 8 1/2 by 11 inch, reduced copy of the map and a full-size 1:250,000 scale map. *Cf.*, however *Erratum*, *supra*.

[13] Our decision concerning the clarity of our RSA rules governing the submission of full-size maps is distinguishable from other cases where cellular applications have been dismissed for failure to comply with the Commission's Metropolitan Statistical Area (MSA) map rules. In those cases, the MSA map rules were specific and unambiguous. *See, e.g., Petitions for Reconsideration of the Return of Round IV Cellular Applications for Having Defective Maps*, 103 FCC 2d 366 (1986); *REM Communication*, 3 FCC Rcd 3705 (1988); and *Queen City Cellular Communications*, 5 FCC Rcd 509 (1990).

[14] Western also requested a stay of the non-wireline lottery for Market 709, pending final action on the application for review. On July 30, 1990, the MSD, by Memorandum Opinion and Order, 5 FCC Rcd 4835 (Mob. Serv. Div. 1990), denied Western's request for a stay, finding that Western had failed to demonstrate that it would suffer irreparable harm if the lottery were to take place as scheduled.

[15] *See* note 9, *supra*. In Amendment of the Commission's Rules for Rural Cellular Service, Fourth Report and Order, 4 FCC Rcd 2542 (1988), the Commission established the requirement that a non-wireline applicant must include a firm financial commitment from a potential lender in its initial application. In so doing, the Commission stated that "[t]he financial showing must be included in the application. If an application that is selected first in the lottery does not include a firm financial commitment, it will be dismissed." *Id.* at 2545. Thus, the Commission has made it clear that an RSA application is unacceptable for filing if it does not include a firm financial commitment.

[16] In accordance with Section 22.917(c)(5) of our rules, Western initially sought to demonstrate that it had obtained a firm financial commitment from a state or federally chartered bank, savings and loan association or another recognized financial institution.

[17] On April 12, 1989, Western filed an amendment to its application in which it states that it has obtained vendor financing from Novatel and that it is no longer necessary to rely on Peery financing. However, because Western's application was patently defective for failing to include a firm financial commitment, it may not be amended after the filing date to bring it into compliance with Commission rules. *See REM Communications, supra*. Accordingly, Western's amendment will not be accepted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DANA COMMUNICATIONS, LTD. File No. 10614-CL-P-314-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 314, Alabama 8 (Lee)

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1991 Released: September 17, 1991

By the Commission:

1. Dana Communications, Ltd. (Dana) won the lottery for the non-wireline cellular license for the Alabama 8 (Lee) Rural Service Area (RSA). The Mobile Services Division (MSD) dismissed the application for failure to demonstrate Dana's financial qualifications as required by Section 22.917(c) of the Commission's rules. Dana filed a petition for reconsideration and no responsive pleadings were filed. The MSD has referred this matter to the Commission pursuant to Section 1.106(a)(1) of the rules. For the reasons discussed below, we affirm the MSD's action and deny the petition.

I. BACKGROUND

2. Dana filed its application on November 4, 1988, won the August 23, 1989 lottery for Alabama 8, and was named tentative selectee on November 30, 1989.[1] The MSD dismissed the application as unacceptable for filing by a letter dated May 18, 1990.[2] On May 24, 1990, Dana submitted an amendment to its financial showing. The amendment consists of a March 25, 1988 auditor's report certifying the accuracy of a financial statement which was included in Dana's application.

II. DANA'S CONTENTIONS

3. Dana argues that the MSD improperly dismissed its application as unacceptable for filing. Dana asserts that the MSD twice found the application acceptable for filing, first when it included the application in the lottery, and again when it issued a public notice announcing Dana as the tentative selectee.[3] Dana contends that the May 18, 1990 dismissal letter amounts to reconsideration of the MSD's finding of acceptability more than 30 days after the determination was made, in violation of Section 405 of the Act and Section 1.113 of the Commission's rules.[4] Dana states that it has begun preparations for its cellular system in reliance on the MSD's finding of acceptability, and that the MSD should be barred on equitable grounds from revisiting this determination.[5]

4. Dana further argues that its application, as originally filed, fully demonstrates Dana's financial qualifications pursuant to the requirements of Section 22.917(c)(7) of the rules. Section 22.917(c)(7), it notes, provides that:

> Non-wireline applicants intending to rely upon financing obtained through a parent corporation must submit the information required by § 22.917(c)(6) (i) through (iii), as the information pertains to the parent corporation.

Dana states that it is relying on a financial commitment by its general partner, Lida, Inc., and has submitted the information required by Section 22.917(c)(6)(i)-(iii) of the rules, as it relates to Lida.[6]

5. Dana argues that Section 22.917(c)(6)(i) does not require submission of the auditor's certification, but rather that the financial statements included in the application be audited and certified within a year of filing.[7] Dana contends that its application included the financial statement required by Section 22.917(c)(6)(i), and that the May 24, 1990 amendment clarifies that the financial statement was audited and certified within the time period prescribed.[8] Dana further argues that it submitted the documents required by Sections 22.917(c)(6)(ii) and (iii) of the rules and that its financial statement and balance sheet show the availability of net current assets far in excess of the amount committed to Dana. Dana, citing *Amendment of the Commission's Rules for Rural Cellular Service* (*Fourth Report and Order*), 4 FCC Rcd 2542, 2545 (1988), asserts that the purpose of Section 22.917(c) is to prevent the filing of speculative applications by unqualified applicants. It states that its application was filed by a sincere and qualified applicant, and therefore meets the purpose of the rule.

6. Dana contends that it should now be allowed to file the auditor's report as a minor amendment pursuant to Sections 22.23(c) and 22.918(b) of the rules.[9] Dana cites several cases in which the Commission accepted financial showing amendments, and asserts that it was never given notice that the Commission would deviate from the policies set forth in these cases. Dana urges that if there was some uncertainty regarding its financial showing the MSD should have requested additional information. It cites several MSD letters requesting financial and other information from other RSA non-wireline lottery winners.[10] Dana also notes that in *Gardner Enterprises, Inc.*, 4 FCC Rcd 5664 (Mob. Serv. Div. 1989), the MSD accepted an accountant's subsequently filed affidavit to establish that a financial statement was audited pursuant to Section 22.917(c)(6)(i). Dana argues that by failing to request additional information or allow amendment of the application, the MSD has acted in an arbitrary and capricious manner and has treated Dana differently from other similarly situated applicants.

7. Finally, Dana argues that even if Section 22.917(c)(6)(i) requires submission of the auditor's certification, the requirement should be waived in this case. Dana states that it has met the waiver requirements of Sections 22.19(a)(1)(i) and (ii) of the rules.[11] Dana claims that the purpose of the rule has already been met because Dana is a sincere and qualified applicant, and that the public interest will be served by a waiver because reinstatement of the application will result in earlier service to the public. Dana further argues that because the financial statement was, in fact, audited and certified, dismissal

for failure to include the certification is inappropriate and unduly harsh.[12] Dana asserts that the MSD waived the certification requirement in *Gardner* under circumstances similar to those present here, and that the Commission must grant waivers in a consistent manner.[13]

III. DISCUSSION

8. Section 22.20 of the rules says an application will be returned as unacceptable for filing if, *inter alia*, required information is not included. Section 22.26(b) of the rules states explicitly that acceptance of an application for filing merely means the application has been subject to preliminary review, and does not preclude later dismissal if the application is found to be defective. *See Progressive Cellular III B-2*, 5 FCC Rcd 2772 (1990); *Rem Communication*, 3 FCC Rcd 3705 (1988). Inclusion in a lottery, and announcement of a tentative selectee, are merely intermediate steps in the processing of an application, and are not subject to the provisions regarding reconsideration, and the Bureau was not precluded from dismissing the application under Section 22.20 more than 30 days after its prior acceptance for filing. Therefore, we reject Dana's argument that its application was improperly dismissed. Moreover, given the clear language of Section 22.26(b), Dana embarked on preparations at its own risk.[14]

9. Section 22.917(c)(1) of the rules states that non-wireline RSA applicants must demonstrate their financial qualifications at the time the application is filed. In the *Fourth Report and Order* the Commission expressly states that that the financial showing must be included in the application. 4 FCC Rcd at 2545. Pursuant to Section 22.917(c)(7), Dana was required to submit the financial information required by Sections 22.917(c)(6)(i)-(iii), *see* note 6 *supra*, as that information pertains to Dana's general partner, Lida, Inc. Pursuant to Section 22.917(c)(6)(i), Dana was required to submit audited financial statements certified within one year of the date of the application. The auditor's certification, which indicates the reliability of the accompanying financial statements, is an integral part of the financial demonstration required by Sections 22.917(c)(1) and (c)(6)(i) and must be included in the application. *See Progressive Cellular III B-2*, 5 FCC Rcd 2772 (1990); *Fourth Report and Order*, 4 FCC Rcd at 2545. Because Dana's application failed to include the certification required by Sections 22.917(c)(1) and (c)(6)(i), the application is defective and was properly returned as unacceptable for filing pursuant to Section 22.20.[15]

10. Dana proffers that Metropolitan Statistical Area (MSA) cellular applications were not dismissed for minor errors in financial showings, and that Dana was never advised that the Commission would deviate from this processing standard. Several of the cases cited are irrelevant, because they were decided under the less stringent financial qualifications requirements in a different subsection of the rules used for MSA applications in the top 120 markets,[16] while other cases[17] are distinguishable, because they did not involve an applicant's failure to submit financial information specifically required by the Commission's rules.[18] Moreover, Dana's failure to include the certification constitutes more than a minor error. The auditor's certification is an essential part of an applicant's financial demonstration under Sections 22.917(c)(6)-(7) because it provides independent verification that the applicant does in fact possess the resources claimed. As noted above, failure to include it rendered the application unacceptable for filing. The *Fourth Report and Order* specifically stated that failure to include the financial showing in the application would result in dismissal. 4 FCC Rcd at 2545. Thus Dana was advised of the processing standard to be applied. Finally, it is axiomatic that an application found unacceptable for filing may not be amended. *Progressive*, 5 FCC Rcd at 2772; *REM Communications*, 3 FCC Rcd 3705 (1988).

11. We also reject Dana's argument that the MSD should have requested additional information before dismissing the application. Dana cites several MSD letters which requested information from RSA non-wireline lottery winners. However, none of the letters involved applications which failed to include information specifically required to be submitted by Section 22.917(c) of the rules.[19] Dana's application was not ambiguous[20] and failed to include either a commitment letter from an authorized lending institution pursuant to Section 22.917(c)(5), or financial statements with an auditor's certification pursuant to Sections 22.917(c)(6)-(7). Dana's application was thus plainly defective and properly dismissed by the MSD. *See Progressive*, *supra*.[21]

12. Dana's request that it be granted a waiver of the Section 22.917(c)(6)(i) certification requirement must be denied. Dana has not alleged any unusual circumstances that would prevent its compliance with the rule. The language of Sections 22.20 and 22.917(c)(6)(i) is clear, and the *Fourth Report and Order* gave applicants explicit notice that failure to include the required financial showing in their applications would result in dismissal. *See* 4 FCC Rcd at 2545. The auditor's certification is an essential part of the financial demonstration required under Sections 22.917(c)(6)-(7), because it provides independent verification that the applicant actually has the resources claimed. For these reasons, a waiver of the certification requirement of Section 22.917(c)(6)(i) has not been justified.[22]

13. Finally, we turn to Dana's assertion that *Gardner* requires waiver of the certification requirement in the present case. In *Gardner*, the MSD waived the requirement that the certification be included in the application, and allowed use of a subsequently submitted affidavit to demonstrate that the financial statement was in fact audited and certified. Noting that the financial statement was both included in the application and audited prior to filing, the MSD concluded that failure to include the certification was a minor error and that a waiver was appropriate. As we have already discussed, the submission of independent verification of the financial showing required by Sections 22.917(c)(6)-(7) constitutes an essential component of an applicant's submission, and is an acceptability requirement. Any exception to this requirement carries a heavy burden, which we believe was inadequately supported in *Gardner*. Therefore, we find that the MSD erred when it held that failure to include the certification was a minor error, and when it waived the requirement of the rule. Accordingly, the MSD's decision in *Gardner* is overruled to the extent it conflicts with the policies set forth herein.[23]

14. In conclusion, Dana's application failed to include the financial showing required by the rules and was properly dismissed by the MSD as unacceptable for filing.

IV. ORDERING CLAUSE

15. For the foregoing reasons, IT IS ORDERED that the petition for reconsideration filed by Dana Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Public Notice Report No. CL-89-254 (released August 24, 1989) (announcing lottery winner); Public Notice Report No. CL-90-53 (released November 30, 1989) (announcing tentative selectee).

[2] The MSD letter noted that the application relies on a financial committment letter from an entity that is not a financial institution of the type described in Section 22.917(c)(5) of the rules, and thus does not demonstrate Dana's financial qualifications pursuant to the requirements of Section 22.917(c) of the rules.

[3] Dana states that under Section 309(i) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. Section 309(i), the Commission may include applications in a lottery only after determining that the application is acceptable for filing. As Dana notes, cellular applicants meet this initial acceptability requirement by certifying that the application is complete and contains all the information required by the rules. *See* Section 22.913(b)(3) of the rules. Dana further states that the lottery winner is named as tentative selectee only after its application has been reviewed and found acceptable for filing.

[4] Section 405 of the Act states in pertinent part that "[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Section 1.113(a) of the rules states that "[w]ithin 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."

[5] Dana also argues that the MSD dismissal letter does not adequately set forth the reasons for the application's dismissal. Dana states that the letter refers to Section 22.917(c)(5) of the Commissions rules, which concerns financing obtained from specified lending institutions, but Dana was seeking to demonstrate its financial qualifications pursuant to Section 22.917(c)(7) of the rules, which concerns financing obtained through a parent corporation.

[6] Section 22.917(c)(6) provides as follows:

> (6) Non-wireline applicants intending to rely on personal or internal resources must submit -
>
> (i) Audited financial statements certified within one year of the date of the cellular application, indicating the availability of sufficient net current assets to construct and operate the proposed cellular system for one year;
>
> (ii) A balance sheet current within 60 days of the date of filing that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed cellular system for one year; and
>
> (iii) A certification by the applicant or an officer of the applicant organization attesting to the validity of the unaudited balance sheet.

[7] In support of this argument Dana notes that Section 22.917(c)(6)(iii) separately sets forth the requirement that the applicant submit a certification for the unaudited balance sheet.

[8] Dana also argues that the application contained evidence indicating that the financial statement was audited and certified as required by the rules. Dana asserts that it is a generally accepted accounting practice to indicate when financial statements have not been audited by referring to the accountant's review or compilation report, and that the absence of this notation on the financial statement is evidence that the statement was audited.

[9] Section 22.918(b) of the rules provides that tentative selectees may file minor amendments to their application. Section 22.23(c) states that all amendments are classified as minor except for certain specified amendments listed in Section 22.23(c)(1)-(4).

[10] These MSD letters sought to verify that applicants had paid commitment fees required by the lending institution; that an equipment supplier had sufficient funds to cover all the financial commitments made; and that a proposed lender was a recognized financial institution. Dana also cites a letter which requested, in addition to other information, a current balance sheet for the applicant. Dana further states that the MSD has requested information regarding the citizenship of an applicant's partners, and information regarding engineering matters.

[11] Sections 22.19(a)(1)(i)-(ii) provide that waivers will only be granted upon a showing:

> (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or
>
> (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

[12] Dana suggests that because the Commission's objective behind the financial requirement is to deter speculation, a better sanction would be to grant the application and require Dana to construct and operate the system for at least one year.

[13] Dana avers that it has met the general waiver standards articulated in *Pactel Cellular*, 4 FCC Rcd 4561 (Com. Car. Bur. 1989) and *Fred Farley*, 4 FCC Rcd 4670 (Com. Car. Bur. 1989). Thus, Dana states that a waiver would prevent the need for another lottery, and would allow service to be provided by a sincere and qualified applicant. Dana also states that accepting the amendment would not hinder processing, and that the public interest would not be served by inflexibly applying Section 22.917(c)(7).

[14] We cannot concur with Dana's claim that the MSD dismissal letter did not set forth the reason for dismissal. The MSD letter advised Dana that its application was dismissed for failure to comply with Section 22.917(c). Dana responded by submitting the auditor's certification and by fully addressing the certification issue in its petition for reconsideration.

[15] Section 22.20(a) of the rules provides that an application will be returned as unacceptable for filing if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

[16] In the top 120 MSA markets, applicants under Section 22.917(a) of the rules were merely required to provide "reasonable assurance" that the necessary funds would be available. *See Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 512, 516-17 (1982). MSA applicants beyond the top 120 and all RSA applicants are subject to a "firm financial commitment" standard and their applications are dismissed if they fail to submit the required financial information at a specified time. *See Fourth Report and Order*, 4 FCC Rcd at 2545; *Cellular Lottery Further Reconsideration Order*, 59 RR 2d 407, 413 (1986).

[17] *See Warren American Oil Company*, 2 FCC Rcd 3505 (1987)(corporate applicant relying on internal financing had use of funds authorized by president rather than board of directors); *Athens Cellular, Inc.*, 2 FCC Rcd 3526 (Mob. Serv. Div. 1987)(financial commitment letter addressed to individual applicant rather than to applicant's subsequently formed corporation). Dana also cites *Florida Cellcom*, 2 FCC Rcd 7044, 7046-47 (Com. Car. Bur. 1987), where freight charges and taxes were not included in the applicant's cost estimate. However, the Commission has not specified precisely what items must be included in the cost estimate, but merely that a realistic and prudent cost estimate be provided. Furthermore, the applicant's financial showing in *Florida Cellcom* demonstrated the availability of sufficient funds to cover the additional items.

[18] Dana also cites four MSD decisions where post 120 MSA applicants were allowed to amend their financial showings to submit information specifically required by Section 22.917(b)(1) of the rules. In *Cinkutis, Inc.*, 2 FCC Rcd 6384 (Mob. Serv. Div. 1987) an amendment was used to clarify that a pledge to arrange financing was a firm financial commitment. In *Cagel Cellular Communications Corporation*, 2 FCC Rcd 4270 (Mob. Serv. Div. 1987), *aff'd on other grounds*, 6 FCC Rcd 285 (1991) and *Natubhai Patel*, 2 FCC Rcd 1667 (Mob. Serv. Div. 1987) the applicants' balance sheets were submitted by corrective amendments, while in *Lynn Juanes*, 2 FCC Rcd 4371 (Mob. Serv. Div. 1987), an amendment was used to show that an undated balance sheet was current within thirty days of filing. In the three balance sheet cases, the applicants were not relying on internal financing, so the balance sheets were not necessary to demonstrate the availability of sufficient funds, and in each of these cases the applicants had included a firm commitment for the amounts required. Furthermore, to the extent the four MSD cases are inconsistent with our decision here, these cases are overruled. Staff decisions do not, of course, bind the Commission and are not an appropriate basis for reliance. *See Amor Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990); *Malkan FM Associates v. FCC*, No. 90-1282 (D.C. Cir. June 14, 1991).

[19] Although the Commission has sometimes later requested proof that a commitment fee has been paid, such proof has never been considered an essential part of the applicant's initial financial showing. Similarly, applicants are not required to submit documentation regarding the status of proposed Section 22.917(c)(5) lending institutions. In a letter request for a balance sheet cited by Dana, the MSD was concerned about the applicant's independence rather than its financial qualifications. The applicant was relying on a financial commitment pursuant to Section 22.917(c)(5) and was not required to include a balance sheet in its application. Other letters cited by Dana did not involve the Section 22.917(c) requirement that the financial demonstration be included in the application and are therefore dissimilar from the situation here.

[20] Dana argues that the absence of a notation on the financial statement is evidence that the financial statement was audited. The absence of a notation is not sufficient to demonstrate that an RSA applicant's financial statement is audited as required by Section 22.917(c)(6)(i). The financial statement unambiguously failed to include the certification required by the rules and, therefore, the showing is defective.

[21] We do not believe that requiring Dana to build and operate its system for one year, as opposed to selling it immediately, is an appropriate sanction because all RSA cellular applicants are required to certify that they intend to build and operate a cellular system.

[22] *See Northeastern Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

[23] We also note that since *Gardner* was decided after Dana filed its application, Dana cannot claim any detrimental reliance on *Gardner*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Civil Rights Complaint of
Discrimination Against Handicapped
Individuals Seeking Operator Licenses
in the Amateur Service.

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1991 Released: September 18, 1991

By the Commission:

I. INTRODUCTION

1. On October 16, 1990, the Chief, Private Radio Bureau, denied the class action civil rights complaint of Mr. Peyton L. Moncure. In his complaint, Mr. Moncure alleged that the Commission unlawfully discriminates against those handicapped individuals who are physically unable to use a telegraph key or unable to coordinate its use by requiring them to demonstrate a knowledge of Morse code as a condition for engaging in voice operations in the amateur service. By letter of October 22, 1990, Mr. Moncure filed an Application for Review of the Bureau Chief's denial and of all prior Bureau decisions relating to his discrimination and civil rights complaints. This action denies his Application for Review.

II. APPLICATION FOR REVIEW

2. In his Application for Review, Mr. Moncure argues that the requirement for demonstration of telegraphy proficiency as a condition of obtaining an amateur license violates the Rehabilitation Act of 1973 (Rehabilitation Act) [1] and the Americans with Disabilities Act of 1990 (ADA). [2] He maintains that the sponsors of the bill that later became the ADA wanted handicapped Americans to have equal access to all types of communications, not just telephone communications. He argues that the Commission must eliminate the requirement for telegraphy proficiency for handicapped individuals who are physically unable to use a telegraphy key or to coordinate its use.

III. DISCUSSION

3. The Bureau properly rejected Mr. Moncure's request to eliminate the requirement for telegraphy proficiency. International Telecommunication Union (ITU) Radio Regulation No. 2735 (Geneva, 1979) requires a person seeking a license to operate an amateur station transmitting on frequencies below 30 MHz to prove proficiency in telegraphy. This requirement cannot be eliminated without abrogating the commitment of the United States to abide by the international regulations. Moreover, the obligation of the United States to ensure telegraphy proficiency was not affected by enactment of the ADA or the Rehabilitation Act, as Mr. Moncure claims.

4. Neither the telecommunications provisions of the ADA nor any of its other provisions apply to the amateur service. Section 401 of the ADA adds a new Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. § 225, to require carriers to provide, within three years, interstate and intrastate relay services to hearing/speech impaired individuals consistent with regulations promulgated by the Commission within one year of ADA's enactment. Section 402 of the ADA amends Section 711 of the Communications Act of 1934, as amended, 47 U.S.C. § 611, to require closed-captioning of the verbal content of a public service announcement (psa) which is produced or funded, in whole or in part, by an agency or instrumentality of the Federal Government. Broadcast licensees are not required to supply captioning for a psa that fails to include it and are absolved from liability for broadcasting a psa without captioning, unless they intentionally refuse to broadcast captioning included with an announcement.

5. Mr. Moncure includes a statement by a sponsor of the Senate bill concerning Americans who have disabilities to the effect that the legislation would prohibit discrimination against such individuals, insofar as communications are concerned. As noted, however, the telecommunication provisions of the ADA itself do not apply to the requirements of the amateur service. We construe this statement in the legislative history, therefore, to apply only to those matters covered by the legislation. In sum, there is no indication that the Congress intended to supersede the international requirements that apply to the amateur service.

6. Similarly, we deny Mr. Moncure's appeal of the June 6, 1990, denial by the Chief, Private Radio Bureau, of his request for a waiver of the telegraphy requirement and his complaint alleging that he was discriminated against because of his handicap in violation of the Rehabilitation Act of 1973, as amended. [3] The Bureau denied Mr. Moncure's request for a waiver of the telegraphy requirement because a waiver would violate Radio Regulation No. 2735, *supra*. The Rehabilitation Act did not supersede the international requirement. The Rehabilitation Act prohibits discrimination only against handicapped individuals who are "otherwise qualified" to participate in the Government program in question. The Bureau properly concluded that a person unable to meet the telegraphy requirements for amateur operation is not a qualified handicapped person under the Rehabilitation Act. Further, the Bureau noted that there is no requirement to modify a licensing requirement to accommodate a handicapped person, if such modification would result in a substantial alteration of the amateur operator licensing system.

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[1] 29 U.S.C. 701-796.

[2] Pub. L. No. 101-336,104 Stat. 327 (1990). The ADA provisions that pertain to telecommunications are codified at 47 U.S.C. 225 and 611.

[3] 29 U.S.C. § 794. Although Mr. Moncure's appeal of the June 6, 1990, Bureau action is untimely, we have considered it herein.

7. Although we deny the Application for Review, the petitioner's complaint has, in part, been rendered moot by our action to revise the examination requirement for the Technician Class amateur operator license. On December 13, 1990, in PR Docket No. 90-55, we amended the amateur service rules to create a new codeless class of amateur operator license. [4] Effective February 14, 1991, an examinee no longer must prove Morse code proficiency in order to qualify for a Technician Class amateur operator license. The Technician Class license includes all amateur operator privileges above 30 MHz.

8. Further, although all persons who wish to engage in amateur service communications on frequencies below 30 MHz must still pass at least a 5 words per minute telegraphy examination, there are special procedures to help handicapped individuals. Blind persons may take the examination in Braille or have the questions read to them. Individuals with hearing impairments may use a vibrating surface or a flashing light for the telegraphy receiving examination. Persons who have difficulty in hand coordination may dictate their answers. In addition, the special procedures include, where warranted, suitable pauses in sending the telegraphy message so that the examinee may absorb and interpret what was sent. The telegraphy examination usually consists of a receiving test, but, where warranted, a sending test may be substituted. The special accommodative procedures enable handicapped persons to become amateur operators, while ensuring that the telegraphy requirement of the international Radio Regulations is met.

IV. ORDERING CLAUSES

9. Pursuant to the authority contained in 47 U.S.C. § 154(i), IT IS ORDERED that the Application for Review filed by Peyton L. Moncure IS DENIED.

10. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

11. For further information concerning this Memorandum Opinion and Order contact Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] 5 FCC Rcd 7631 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of:

WILLIAM F. PEEL, JR.	File No. BPH-890906MM
MINORITY BROADCASTING GROUP LIMITED	File No. BPH-890914MT
KAREN M. LOWERY	File No. BPH-890914MU
SEA OAKS BROADCASTING	File No. BPH-890914ND
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-890914NF
COASTAL BROADCASTING CORPORATION	File No. BPH-890914NH
WHITE CITY BROADCASTING, INC.	File No. BPH-890914NP
Q PRIME INC.	File No. BPH-890914NV
HEATHER WILLSON CASS	File No. BPH-890914NW
MIDWAY BROADCASTING COMPANY	File No. BPH-890914OD

For Construction Permit for
New FM Station, Channel 284A,
White City, Florida

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1991 Released: September 18, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Review Board has under consideration an Appeal filed by Crystal Communications, Inc. (Crystal), pursuant to 47 CFR § 1.301(a)(2), on July 29, 1991. The Appeal is unopposed. Crystal is one of several applicants seeking to establish a new FM station on Channel 284A in White City, Florida, and is currently involved in discovery proceedings prior to the comparative hearing. Crystal here appeals the *Memorandum Opinion and Order*, FCC 91M-2237, released July 22, 1991 (*MO&O*), of Administrative Law Judge Walter C. Miller (ALJ) requiring the production of certain documents over Crystal's claim of attorney-client privilege and work-product doctrine protection.

BACKGROUND

2. The ALJ's *Prehearing Order*, FCC 91M-1639, released May 16, 1991 (*Prehearing Order*), among other things, stated that there would be "automatic" document production and appended a list of categories of documents that each applicant was required to produce. In response, Crystal filed a "Motion For *In Camera* Inspection of Privileged Documents" on June 13, 1991. In its Motion, Crystal stated that twenty-one documents were being withheld from production based on claims of attorney-client privilege and/or work-product doctrine protection. Crystal attached the subject documents to its pleading, seeking *in camera* inspection and a protective order shielding the documents from discovery. Crystal's Motion was opposed by Midway Broadcasting Company.

3. The ALJ granted Crystal's Motion in part and denied the Motion in certain respects. More specifically, the ALJ granted Crystal's request for protection of twelve documents (Document Nos. 1, 2, 3, 5, 6, 7, 9, 11, 13, 14, 15, 19) and part of Document No. 4 (except the first draft corporate "resolution" on page 3) because "[t]hose documents relate to communications between Crystal's counsel and Crystal's voting stockholders, and are worthy of a privilege claim." *Id.* at para. 5. However, he denied Crystal's request and required production of eight other documents (Document Nos. 8, 10, 12, 16, 17, 18, 20, 21) and other portions of Document No. 4. With respect to Document Nos. 8, 10, 12, 16, 17, 18, the ALJ denied protection, declaring that they contained communications between counsel and *non-voting* stockholders. According to the ALJ, Crystal "*automatically* waived the privilege regarding communications between counsel and *passive* non-voting stockholders, William and John Murray." *Id.* at para. 9 (footnote omitted). The ALJ reasoned (*id.*):

> Invariably standard comparative cases turn on the quantitative integration awarded the participants. Each applicant must (if he's worth his salt) thoroughly test the *bona fides* of his opponents' ownership structure, especially if that opponent's quantitative integration claim is equal to or higher than his own. To allow a privilege claim to thwart or even blunt such a comparative testing would turn the hearing process into an abnormal illusion, at best.

Further, the ALJ denied protection for the two remaining documents (Document Nos. 20 and 21) because they contained communications between counsel and an engineering consultant "and appear to relate to a non-hearing matter; namely, a Petition For Rule Making." *Id.*, at para. 8.

4. In its Appeal, Crystal principally argues that: (1) the ALJ cited "no controlling legal authority" for his rulings; (2) the attorney-client privilege is "*unqualified*" and extends to "all owners," including passive owners; (3) the ALJ's stated rationale -- to facilitate the testing of the "*bona fides*" of an applicant's ownership structure -- does not justify "gutting" the attorney-client privilege; (4) Crystal has not sought to "thwart" examination of its "*bona*

fides" and has, in fact, "produced hundreds of pages of documents and made available for lengthy depositions all four of its stockholders without challenge;" (5) the ALJ failed to rule on Crystal's claim of work-product doctrine protection for six of the documents in question (Document Nos. 8, 10, 12, 16, 17, 18); and (6) the ALJ mischaracterized Document No. 21 as pertaining to a "non-hearing" matter when, in fact, it relates to the "site selection process and Crystal's technical proposal." Appeal at 3-6.

5. Crystal has withdrawn its protection claim for two documents (Document Nos. 4 and 20). Thus, the Board must consider only Crystal's request for protection for the remaining seven documents (Document Nos. 8, 10, 12, 16, 17, 18, 21), copies of which have been furnished to the Board for *in camera* inspection.

DISCUSSION

6. As noted earlier, the ALJ denied protection for Document Nos. 8, 10, 12, 16, 17, 18, declaring that Crystal had "waived" privilege where there were communications between counsel and "non-voting" stockholders. The Board, however, is of the view that the ALJ erred in so holding, and in failing to analyze the specific merits of Crystal's claims of protection for each document. The ALJ cited no legal authority to support his conclusion (nor have the parties). Although non-voting stockholders are, by definition, "passive owners," they are nonetheless "owners" and, as such, are included as part of the corporate applicant (or "client") for purposes of applying the attorney-client privilege and the work-product doctrine. To hold otherwise would thwart the general purpose of the privilege which is:

> [T]o protect not only the giving of professional advice *to those who can act on it* but also *the giving of information to the lawyer* to enable him to give sound and informed advice. *Upjohn Company v. United States*, 449 U.S. 383, 391 (1981) (emphasis supplied); *Opal Chadwell*, 103 FCC 2d 840, 841 (Rev. Bd. 1986) (purpose of attorney-client privilege is "to encourage complete disclosure of facts between client and attorney on the rationale that the latter can act effectively *only if fully advised of all pertinent facts by the party* he represents.").

Here, the documents in question pre-date the filing of Crystal's application[1] and include such items as counsel's notes of telephone conferences with Crystal stockholders and questionnaires prepared by counsel for the stockholders to complete, and were apparently intended to gather information from all stockholders of Crystal prior to filing Crystal's application, not just the voting stockholder.[2]

7. Crystal specifically claims attorney-client privilege for Documents Nos. 10, 12, 16, 17, and 21. The elements of attorney-client privilege are:

> (1) the existence of an attorney-client relationship; (2) a communication from the client to his or her attorney; (3) the communication is legally related; and, (4) there is an expectation of confidentiality. The privilege also extends to communications from the attorney to the client, at least to the extent that such communications might tend to reveal confidential facts disclosed by the client.

WWOR-TV, Inc., 5 FCC Rcd 6261, 6262 (1990) (citations omitted).

8. Document Nos. 10, 12 and 17 consist of notes written by communications counsel (either Linda Eckerd, Esq., Howard Weiss, Esq., or Mary Lawless, Esq.) regarding telephone conferences with stockholders of Crystal (William Murray, Barbara Marshall, and John Murray) and contain confidential information discussed by the stockholders. Document No. 16 consists of a facsimile transmittal and a sample bank letter from counsel (Mary Lawless, Esq.) to a stockholder (John Murray) of Crystal. Such documents come within the attorney-client privilege because each involves an attorney-client relationship, a communication between the client and the attorney, and a communication legally related to this proceeding (with a presumed expectation of confidentiality).

9. Crystal also claims attorney-client privilege (and work-product protection) for Document No. 21. The ALJ refused to give this document such protection because it "relate[s] to communications between communications counsel and an engineering consultant and appear[s] to relate to a non-hearing matter; namely, a Petition For Rule Making." *MO&O* at para. 8. We disagree. Communications between counsel and engineering consultants are protected where the engineer qualifies as an "'agent' of the client, a needed 'technical expert.'" *See Western Cities Broadcasting, Inc.*, 6 FCC Rcd 3599, 3600 (Rev. Bd. 1991); *Opal Chadwell, supra*, at 846. Further, based on our *in camera* inspection of the document in question, we conclude that it relates to site relocation, as represented by Crystal. Thus, Document No. 21 is also protected.

10. The Board next considers whether any of the remaining documents in question constitute work-product, as claimed. This doctrine:

> . . . prohibits the discovery of documents prepared in anticipation of litigation or for trial by or for another party or that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). Nonetheless, the party seeking discovery may obtain the documents upon a showing that it has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Even when a proper showing has been made, the presiding officer should protect against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

WWOR-TV, Inc., supra, at 6262 (citations omitted). Here, Crystal specifically claims work-product protection for Document Nos. 8 and 18. As stated by the Board in *Opal Chadwell, supra*, at 846: "In a work-product discovery analysis, the date on which litigation 'could reasonably have been anticipated' has major importance . . . ." In the instant case, Crystal filed its application on September 14, 1989. The documents in question were created in September 1989. Thus, they clearly were prepared "in anticipation of litigation." *See id.* Furthermore, Document No. 8

contains notes of counsel regarding information to be obtained from Crystal's stockholders, and Document No. 18 is a letter from counsel to a Crystal non-voting stockholder, enclosing ownership questionnaires. Thus, they are both entitled to protection.

11. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Crystal Communications, Inc. on July 29, 1991, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The documents in question were prepared in early September 1989, prior to the filing of Crystal's application on September 14, 1989. The documents filed with the Board do not disclose precisely when Crystal was incorporated, but it is likely that at least some of the documents in question pre-date incorporation as well. *See* Crystal's Appeal at n.3.

[2] As noted, the ALJ declared in his *MO&O* that there is a need "to test the *bona fides* of . . . [Crystal's] ownership structure." In *Metroplex Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987), the Board considered whether documents relevant to the preparation and prosecution of a party's application and "the *bona fides* of the roles of the partners in the preparation of the case" must be produced. In relevant part, we stated:

> "[A] party may obtain discovery of documents . . . *only upon* a showing that the party seeking discovery has substantial need of the materials . . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Metroplex Communications, Inc., supra, at 4514. Given the fact that Crystal has already "produced hundreds of pages of documents and made available for lengthy depositions all four of its stockholders without challenge," Appeal at 5, we are satisfied that basic factual information is available. In *Metroplex*, we similarly declined to order production of "letters of inquiry and questionnnaires from counsel to the general and limited partners." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-293

In re Application of

MARGARET ESCRIVA File No. BPH-871124MG

SPACECOM, INC. File No. BPH-871124MW

For Construction Permit for a
New FM Station on Channel 223A
in Topeka, Kansas

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1991 Released: September 18, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Board has before it several pleadings directed to its *Memorandum Opinion and Order*, 6 FCC Rcd 4455 (Rev. Bd. 1991)(*Remand Order*), in the above-captioned proceeding. Before it are: (1) a "Petition For Leave To File Request For Reconsideration" and a companion "Request For Reconsideration" filed by Spacecom, Inc. on August 16, 1991; (2) an "Opposition" thereto filed by Margaret Escriva on August 29, 1991; and (3) a "Reply to Opposition" filed by Spacecom on September 9, 1991.[1] In short, Spacecom argues that no further evidence is necessary to reverse the ALJ's *Initial Decision* and to disqualify Escriva on financial grounds. Escriva's opposition challenges Spacecom's petition(s) only insofar as she argues (and/or reargues) the underlying merits of her basic financial qualifications.

2. Spacecom recognizes at the outset of its pleadings that a firm Commission rule holds:

> Petitions requesting reconsideration of an interlocutory ruling made by the . . . Review Board . . . *will not be entertained.*

47 CFR § 1.291(a)(3)(emphasis added). Hereinbelow we formally dismiss Spacecom's petitions under that rule. Nevertheless, in light of the pleadings before us we will briefly clarify our prior *Remand Order* so that no doubt may persist as to the nature or purpose of the supplemental evidentiary hearing we have ordered.

3. As our *Remand Order* explained, the ALJ had found, pursuant to specially designated issues, (1) that Escriva had not intentionally *misrepresented* her financial qualifications when she so amended her application in early 1988; [2] and (2) that, in his view, Escriva was then (and later in 1990) fully qualified on her finances.

4. But, in the face of Spacecom's exceptions, the Board was unable to confidently affirm the latter determination because the record appeared to contain significant gaps and contradictions as to Escriva's alleged financial resources at the time of her 1988 application amendment. Our *Remand Order* also observed that, following the Commission's occasional practice, the Board might have ordinarily required the applicant to merely supplement the existing record so as to obviate the lingering questions. *See* 6 FCC Rcd at 4457 (and cases cited therein). However, we found, much as the Commission had in *Opal Chadwell*,[3] that mere supplementation in this particular case was unlikely to resolve the critical ambiguities because "the scope and character of the evidence necessary to find that Escriva was, in fact, basically qualified will require the facilities of a hearing forum."

5. Escriva here makes several claims in her own bid to avoid the adduction of supplementary evidence. First, she argues that she should not be put to the expense of providing appraisals (and/or other reliable evidence) to demonstrate that the liquid and non-liquid assets purportedly relied upon for her positive financial (re)certification would actually produce sufficient funds required for her to construct and operate her proposed station.[4] Second, Escriva submits that although her reported financial source (fiance William Cordell) was purportedly relying on the supposed "quick sale" value of his Houston, Texas roof-top leasing business to produce the $185 thousand in loan funds necessary for her to construct her proposed station, it is "irrelevant and immaterial" whether Cordell *actually* planned to sell his subject business to produce Escriva's required loan funds.[5] And, third, Escriva maintains that she cannot be found financially unqualified even if "it subsequently turns out that the resources relied upon were in fact not available," because Escriva's own certification was made in good faith.[6] We accept none of these contentions.

6. As our *Remand Order* tracked, Escriva's alleged 1988 reliance on an alleged $250 thousand "quick sale" value of Cordell's roof-top leasing business is insufficient on this current record to allay serious substantive questions. As we observed, while a purported offer to purchase a non-liquid asset *might* be an adequate substitute for competent property appraisals "where the claimed value of the property was several times the claimed value of the funds required" to finance a new broadcast station, 6 FCC Rcd at 4457 (and cases cited therein), that is clearly not the situation before us. *See id.*, at 4455-56. Reliable appraisals, setting forth the precise calculation bases for their ultimate valuation of Cordell's subject business in February 1988, are here required to support Escriva's claim that she was fully financially qualified at that time. *See Opal Chadwell, supra.*

7. Next, the question of whether William Cordell was truly planning to sell his business to finance Escriva's application is anything but "irrelevant and immaterial" to Escriva's actual financial ability in 1988. It is undisputed that Escriva has indicated throughout these proceedings that her necessary $185 thousand would have come from the *sale* of Cordell's roof-top leasing business (a "sale," however, on which Cordell has throughout waxed rather ambivalent); and it is clear that without the cash derived from the said "sale" of Cordell's roof-top business, Escriva could not have validly amended her application in February 1988 to avow her newfound financial qualifications.[7] As our *Remand Order* held, and as quite apparently corroborated by Escriva's latest argument, further evidence is necessary to resolve the patent ambiguity over how, *in fact*, Escriva *actually* planned to acquire the neces-

sary $185 thousand. We are utterly disinterested in "hypothetical" sources of potential station financing, since we must assume that Escriva's proposed station is not *itself* "hypothetical."

8. Finally, we do not accept Escriva's contention that her "good faith" is all that is required to find that she was financially qualified at the time she so (re)certified in her 1988 amendment. [8] While "good faith" is most assuredly relevant to the misrepresentation issue tried by the ALJ, *see, e.g., Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983)(intent to deceive required), the question of whether Escriva was, *in fact*, fully qualified according to the Commission's basal financial standard is a discrete, objective issue. *See generally Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 (1991) ("reasonable assurance" of a certified asset is separate and distinct from questions of deceptive intent). An applicant faced with a financial issue must show that it "*actually* had a reasonable assurance of funds *at the time of certification*." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989)(emphasis added), *aff'd*, No. 90-1291, slip op. (D.C. Cir. July 12, 1991); *see also Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991)(same). Thus, for instance, in *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8160-61 (Rev. Bd. 1989), *aff'd*, 5 FCC Rcd 5610 (1990), the Board found an applicant not financially qualified, despite a concurrent finding of no intentional misrepresentation in the initial certification of finances. Under timeless agency precedent, either an applicant prevails on a substantive financial issue or it will be found not basically qualified. *See also, e.g., Opal Chadwell, supra*, 4 FCC Rcd at 1217; *Pepper Schultz*, 5 FCC Rcd 3273 (1990), *aff'd per judgment*, No. 90-1318 (D.C. Cir. March 21, 1991); *Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751 (1990); *GACO Communications Corp.*, 54 RR 2d 77 (Rev. Bd. 1983); *United Broadcasting Co.*, 53 RR 2d 57, 81 (1983). So too here, Escriva must prove by a preponderance of probative evidence that she was, in fact, financially qualified in February 1988 when she so swore. *Aspen FM, supra.* [9]

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to File Request for Reconsideration, and Request for Reconsideration, filed August 16, 1991 by Spacecom, Inc. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] On September 6, 1991, Spacecom also filed a "Petition For Stay," asking that the Board stay the hearing ordered in our *Remand Order*. In light of our action herein, this latest petition is moot.

[2] When she originally filed her application in November 1987, Escriva certified that she was *not* financially qualified. She reversed that negative certification in a February 1988 amendment.

[3] 4 FCC Rcd 1215 (1989).

[4] *See* Escriva Opposition at iii and 17-24. Escriva also contends that the Board may not rely on an order of the Commission's Office of General Counsel requiring the submission of appraisals for non-liquid assets because the General Counsel's order was unpublished. However, in remanding *Opal Chadwell*on a financial issue after reviewing the appraisals and other evidence submitted pursuant to the General Counsel's order, the Commission expressly repeated in full detail the General Counsel's prior demands and solicited even further evidence as to the validity of those appraisals. *See* 4 FCC Rcd at 1215-16. We therefore reject Escriva's procedural argument.

[5] Escriva Opposition at 8-9. Nothwithstanding, Escriva insists that Cordell expressed his "willingness" to sell that business in February 1988 to produce a $185 thousand cash loan to her. Without such a sale, Escriva long ago stipulated that Cordell had insufficient assets to loan her the $185 thousand necessary for her instant financing. *See* Escriva Reply Exceptions, filed April 4, 1991 at 6 ("Escriva agrees with Spacecom that the $250,000 valuation of Mr. Cordell's rooftop-leasing business was the 'linchpin' for Escriva's 1988 financial qualification . . . ").

[6] *See* Escriva Opposition at 10-17.

[7] *Compare* Escriva Opposition at 6-7 w ith id., at 8-9. In essence, Escriva asserts (id., at 9)(emphasis added):

> The Commission merely requires that the assets be available, if necessary. Cf., *e.g., Cornw all Broadcasting Corp.*, 89 FCC 2d 704, 706 (Rev. Bd. 1982) (where the party owns non-liquid assets several times the value of the cash which such assets are relied upon to yield, the FCC cannot seriously question the ability of that party to secure the required funds; Commission imposed no requirement that the applicant actually use those assets to secure the funds). *Thus, Mr. Cordell's "plans" with respect to how he would raise the money are irrelevant, so long as he was "willing" to sell the rooftop management business, if necessary.*

But, even if we accepted at face value Escriva's claim that Cordell's business "could have been" sold for $250 thousand, that amount would not have been "several times the value of cash" necessary to meet Cordell's several broadcast financing obligations, *see Remand Order*, 6 FCC Rcd at 4455, a fact Escriva has previously conceded, *see supra* note 5. Cordell was also obligated, in February 1988, to finance his *own* broadcast application in Abeline, Texas, and it must be shown that a financier can meet the obligations for all applications simultaneously on file with the FCC. *See, e.g., Texas Communications Limited Partnership*, FCC 91-270, released September 4, 1991.

[8] We have not yet reached the issue of Escriva's "good faith"; we have expressly put that issue aside until after we review all of the evidence concerning her 1988 amendment, including evidence on the matters we have pointedly raised. *See Remand Order*, 6 FCC Rcd at 4457.

[9] As *Aspen FM* makes clear, Escriva would not be permitted to amend her 1988 financial proposal at this late date unless (1) she demonstrated "reasonable assurance" of her original financing; and (2) she could also meet the "good cause" test for application amendments under 47 CFR § 73.3522(b)(2). 6 FCC Rcd at 1603-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

ACHERNAR BROADCASTING COMPANY — File No. BPCT-860410KP

LINDSAY TELEVISION, INC. — File No. BPCT-860410KQ

For Construction Permit for a
New Television Station,
Channel 64,
Charlottesville, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1991 Released: September 19, 1991

By the Commission:

1. This case is before us on appeal from a decision of the Review Board, which concluded that the public interest would be served by granting the application of Lindsay Television, Inc. and denying the competing application of Achernar Broadcasting Company. 5 FCC Rcd 6309 (1990). We have decided to deny both applications.

BACKGROUND

2. Because its site is inside the "Quiet Zone" that the Commission established in 1958 for the protection of the National Radio Astronomy Observatory (NRAO) at Green Bank, West Virginia, Achernar was required by 47 C.F.R. § 73.1030(a) to notify the NRAO so that the NRAO might raise any objection to granting its application.[1] The NRAO did object, but stated that it would withdraw the objection if Achernar were to modify the design of its proposed facility so as to suppress radiation in the direction of Green Bank to a certain level. As Achernar refused to modify its proposal, the Hearing Designation Order specified an issue as to whether its proposed station would cause objectionable interference to the NRAO. 1 FCC Rcd 732 (1986).

3. The ALJ resolved the NRAO interference issue against Achernar in the Initial Decision, held that Achernar was therefore disqualified, and granted Lindsay's application. 3 FCC Rcd 5421 (1988). Achernar argued in exceptions to the Review Board that it was pointless to disqualify it in order to protect the NRAO, because Lindsay's proposed station would also render Channel 64 unusable for the NRAO, although it would be outside of the Zone. Holding that it was "essential to establish what will be the impact on radio astronomy. . . in the Quiet Zone of a grant of either application," the Board remanded for further hearing under an issue to determine whether either or both of the proposed stations would render Channel 64 unusable for the NRAO's purposes. 4 FCC Rcd 3629, 3630 ¶ 8 (1989).

4. In a Supplemental Initial Decision, the ALJ found that *both* proposed stations, while in operation, would render Channel 64 totally unusable for the NRAO. 5 FCC Rcd at 967 ¶ 49. Achernar would exceed the maximum tolerable level of interference by 60,013 times, and Lindsay would exceed it by 22,856 times. The ALJ considered a recommendation by the Commission's Mass Media Bureau that a grant of either application be restricted by requiring the licensee to go off the air between midnight and 6:00 a.m. after receipt of 30 days' advance notice from the NRAO of an intention to monitor radiation in the frequency range of Channel 64. Achernar declared that it would accept a grant with such a restriction, but Lindsay opposed the Bureau's recommendation, and the NRAO opposed granting either application, with or without the restriction. The ALJ agreed with the NRAO that the proposed restriction was inadequate, so he denied both applications. *Id.* at 969 ¶¶ 59-62.

5. The Review Board decided, however, that it should not disqualify either applicant under the interference issue. It reasoned that it could not properly deny Lindsay's application based on the prospective impact on the NRAO because the specified issues only go to Achernar's basic eligibility and because it is a question of first impression whether an application for a site outside the Quiet Zone could be denied for such a reason. 5 FCC Rcd 6309, 6311 ¶ 10. The Board therefore concluded that it would make no sense to deny Achernar's application in order to protect the NRAO, as the Board believed that denial of that application would result in grant by default of another that would interfere with the NRAO to essentially the same extent. *Id.* Turning to the comparative evaluation, the Board refused to give Achernar a claimed preference for superior gray-area coverage and then held that Lindsay deserved to prevail because its integration enhancements outweighed Achernar's. *Id.* at 6313 ¶ 16.

6. The Board declined to attach restrictions to the grant. Noting that there was no precedent for attaching such a restriction to a grant to an applicant proposing a location outside of the Quiet Zone, the Board said that it was up to the Commission to take such action. *Id.* at 6311 ¶ 9; 6313 n.5.

7. Achernar contends in an application for review filed on November 29, 1990 that the Board erred in refusing to give it a preference for more efficient coverage, in refusing to charge Lindsay with a diversification demerit, and in awarding Lindsay full quantitative integration credit despite allegedly conflicting business commitments. Lindsay filed an opposition to the appeal on December 14, 1990. On March 28, 1991 we directed the parties to file comments on the possibility of denying both applications in order to protect the NRAO. 6 FCC Rcd 1748. We have received responsive comments from the NRAO, the Mass Media Bureau, and both applicants.

DISCUSSION

8. *Achernar*: The Commission's longstanding policy regarding protection of the NRAO's Greenbank facilities from interference rests on its considered judgment that it serves the public interest to afford "maximum practicable protection" against interference with radio astronomy at

Greenbank from new broadcast transmitters within the defined geographical area known as the Quiet Zone. *Report and Order in Docket No. 16991*, 17 RR 2d 1738, 1739 (1958). That policy determination necessarily implies that protecting the NRAO from objectionable interference is a goal of higher priority than that of fostering service gains when deciding whether to authorize new broadcast transmitters in the Zone. After adopting the policy the Commission took various steps to implement it; for example, it deleted vacant UHF and FM allotments to communities in the Zone regardless of potential service gains, including an allotment to Waynesboro, Virginia for which two applications were pending. *Amendment of Sect. 73.202, Table of Assignments, FM Broadcast Stations (Harrisonburg, Staunton, and Waynesboro, Va., Buckhannon, Elkins, Richwood, and Weston, W. Va.)*, 6 FCC 2d 793 (1967).

9. It would undermine the Quiet Zone policy to grant Achernar's application. Its proposed TV facility would completely obstruct astronomic observation at Greenbank throughout the 6 MHz spectral range of its channel assignment and in sidebands extending over an additional 4 MHz, in a portion of the spectrum that is especially important for radio astronomy, 5 FCC Rcd at 966 ¶¶ 36-39. We find no merit in Achernar's contention that the detrimental effect on the NRAO would be outweighed by the benefit of the new service that Achernar would provide to underserved areas. The aim of the Quiet Zone policy, as its name suggests, is to prevent the institution of new broadcast services in the vicinity of Greenbank that would substantially impair the NRAO's scientific capability, and the natural result of the Commission's administration of that policy over the years since its adoption has been the maintenance of a relative service scarcity in the Quiet Zone. For that very reason, it is likely that applicants proposing sites in the Zone would be able to project unusually high coverage of underserved areas. To weigh such potential service gains projected by such applicants as a factor offsetting detrimental impact on the NRAO as extensive as that which Achernar would cause would thus tend to negate the policy. It would be inappropriate to shift in an *ad hoc* decision from a policy that was promulgated in a Rule Making and followed for three decades to a weaker policy, as Achernar has not shown that objective developments over that period warrant any change.[2]

10. If it were true, as the Board held, that denial of Achernar's application would result in the grant by default of another application with equivalent impact on the NRAO we might agree with the Board that Achernar is not disqualified. That premise is not true, however, as this order demonstrates; we are not issuing an authorization to another applicant that would allow it to cause interference to the NRAO equivalent to that which Achernar would cause.

11. *Lindsay*: As noted, Lindsay, too, would interfere substantially with scientific research at Greenbank if allowed to operate as proposed without restriction. Lindsay contends, however, that this is immaterial to disposition of its application. It argues that, as its principal has invested considerable money and effort in prosecuting its application in the expectation that the Commission would dispose of it in accordance with existing regulations, it would be unfair and unlawful for the Commission to deny the application in order to protect the NRAO. According to Lindsay, such action would be at odds both with 47 C.F.R. §73.1030, which provides for consideration of NRAO impact only in connection with applications proposing sites within the Quiet Zone, with the fact that the Commission has never before considered potential effects on the NRAO in ruling on an application for a site outside of the Zone, and with the rules that allot Channel 64 to Charlottesville and provide for the filing of applications for use of that allotment. Further, Lindsay argues, in effect, that it would be arbitrary to deny its application in the interest of protecting the NRAO without considering the extent to which existing stations on other allotted channels interfere with astronomic observation at Green Bank and comparing the need for service to Charlottesville on Channel 64 with the need for the services that those stations provide.

12. There is no basis in the record for the contention that denying both applications at issue in order to protect the NRAO would be inconsistent with the rule allotting Channel 64 to Charlottesville. It cannot be maintained that our action here negates the allotment, as it has not been shown, and there is no reason to believe, that no other proposal for use of Channel 64 could be devised that would comply with all pertinent rules and would have less adverse effect on the NRAO than these proposals.

13. Lindsay is wrong, moreover, in contending that denying its application would be inconsistent with §73.1030. The gist of its argument in this regard is that by maintaining a rule that requires applicants to notify the NRAO of their proposals only if they specify sites within a defined Quiet Zone the Commission indicated that it was indifferent to potential interference to the NRAO from sites outside of the Zone. But the question of whether the potential effect on the NRAO of transmission from sites outside of the Zone might raise public interest concerns in particular cases was not considered in the 1958 Report and Order adopting the rule, and it is not a necessary implication of the rule that interference to the NRAO from sites outside of the Zone is immaterial. The rule only indicates that the Commission believes that the threat of interference to the NRAO from new stations within the Zone is of such pressing concern as to warrant imposition of a special notification requirement that might be unduly burdensome if imposed beyond the Zone. (Thus, Lindsay is not, as it asserts, "in compliance" with §73.1030 because it specifies a site outside of the Quiet Zone, nor is Achernar in violation of that rule because it specifies a site within the Zone.) Nothing in the rule precludes someone who believes that the public interest would be disserved for similar reasons by the grant of an application for a site outside of the Zone from raising the issue in a petition to deny pursuant to 47 U.S.C. §309(d) and 47 C.F.R. §73.3584 or an informal objection pursuant to §73.3587. *Cf.* 4 FCC Rcd 3629, 3631 n.5.

14. Nor is the Commission barred from denying Lindsay's application merely because there is no established guideline for weighing the needs of the NRAO against needs for broadcast service on allotted channels from sites outside of the Quiet Zone. Section 309(a) of the Communications Act, 47 C.F.R. §309(a), empowers the Commission to grant an application only upon an affirmative finding that the action would serve the public interest, and the Commission cannot waive that statutory requirement merely because it confronts an application presenting a public interest question of first impression. Nor can the Commission negate that requirement because Lindsay

has invested considerable amounts of time, effort, and money in the prosecution of its application. There is no inequity in this, as Lindsay was on notice at all times that the Commission would have to dispose of its application pursuant to all pertinent requirements of the Communications Act. Thus, as the effect that Lindsay's proposed station would have on the NRAO is relevant to the public interest, we may not grant its application without fully considering that circumstance.

15. In light of the fact that Lindsay's proposed station, operating from a site even closer than Achernar's to the NRAO but just beyond the Quiet Zone, would completely block radio astronomy observation at Greenbank in the entire 6 MHz bandwidth of its assigned channel and in an additional 2 MHz in adjacent frequencies, the record does not support an affirmative finding that it would serve the public interest to grant its application. Lindsay does not argue that the detrimental effect to the NRAO that would ensue from such action would be outweighed by any concomitant public benefit, and it is not evident to us from the record that any such overriding benefit would be realized. [3] If, therefore, Lindsay was fairly on notice that it bore the burden of persuasion in this regard, we may now deny its application for failure to meet its burden of proof; otherwise there must be a further hearing on the issue.

16. The Board held that Lindsay did not bear a burden of proving that the benefits of granting its application outweigh the concomitant detrimental effect on the NRAO. It added an issue concerning Lindsay's potential effect on the NRAO on its own motion but held in its Decision that the issue pertained only to Achernar's basic qualifications and not to Lindsay's. 5 FCC Rcd at 6311 ¶ 10. The Board was mistaken in this regard. To be sure, the issue that it framed did not explicitly call Lindsay's basic qualifications into question, but neither did it explicitly confine attention to Achernar's eligibility. As worded, the issue simply called for a factual determination to be made as to whether "Achernar, or Lindsay, or both, would render Channel 64 equally unusable to [the] NRAO . . . ." By specifying this factual issue, the Board put the parties on notice that the findings made pursuant to it would be considered for whatever bearing they might have upon the ultimate issues in this proceeding, one of which is whether it would serve the public interest to grant Lindsay's application. There is no indication in the Board's associated opinion that the issue was being added for a narrower purpose. On the contrary, in answer to the contention by Lindsay that it could not properly inquire as to the impact of Lindsay's proposal on the NRAO, the Board explained in a footnote that "[i]t is our purpose in remanding to consider 'all aspects' of the interference in this case, and to ascertain what action is 'appropriate' in the context of this unusual proceeding." 4 FCC Rcd at 3631 n.5. Further, the Board asserted that the NRAO had standing to object to Lindsay's proposal notwithstanding the fact that its site was not in the Quiet Zone. *Id.* The inference to be drawn from the Board's observation to this effect, viewed in context, is that the record on remand would be considered for whatever bearing it might have on Lindsay's eligibility for grant.[4]

17. In any event, the ALJ and counsel for Achernar, the Bureau, and Lindsay all agreed at prehearing conferences prior to the remand session that the Board had called for an assessment of *both* applicants' basic qualifications in light of the evidence to be compiled concerning the effect of Lindsay's proposed facility on the NRAO. The ALJ so held in the Supplemental I.D., moreover, 5 FCC Rcd at 968 ¶ 52, and Lindsay did not take exception to that ruling. (The Board's subsequent reversal of the ruling was *sua sponte*.) In our March 28 order, we afforded Lindsay a further opportunity to present arguments concerning the conclusion to be drawn concerning disposition of its application in light of the effect that its proposed station would have on the NRAO. 6 FCC Rcd at 1749 ¶ 10. Lindsay asserts in its comments in response to that order that it would be possible to present additional evidence relevant to that issue, but it proffers none and expresses no desire to do so. On the contrary, Lindsay disclaims any intention of presenting any further showing, declaring that to do so would be unduly burdensome.

18. In short, Lindsay has been well aware since the inception of the remand hearing that the evidence taken concerning the effect that its proposed station would have on the NRAO would be considered for whatever bearing it might have on the public interest in granting its application, but Lindsay has chosen to refrain from submitting evidence on point and has relied instead on its ill-founded argument that the impact of its proposal on the NRAO cannot be considered as a ground for denying its application. We conclude that Lindsay has had notice and fair opportunity to meet its burden and that it has not shown that it is entitled to receive a grant.

19. There is no merit in the contention that we may not deny Lindsay's application without considering the extent to which existing stations interfere with the NRAO and comparing the need for service to Charlottesville on Channel 64 with the needs that they serve. We are unable to make such determinations on the basis of the record in this case, but that does not bar us from denying Lindsay's application. If such matters are relevant to the disposition of Lindsay's application then it was incumbent upon Lindsay to present evidence concerning them or bear any concomitant risk of nonpersuasion. As it chose not to make such a showing we need not conjecture as to the possible bearing that such a showing might have on the issues before us. To our knowledge, the NRAO has never objected to the continued operation of any existing station; in the event that such an objection should be raised, the Commission will consider it in light of all relevant facts and circumstances.

20. We are not persuaded that it would serve the public interest to grant either application subject to the restrictions that the Bureau has proposed, which would give the NRAO the right to demand cessation of transmission between midnight and 6 a.m. after giving 30 days' advance notice. We agree with the ALJ and the NRAO that the Bureau's proposal is inadequate for these reasons: (a) the inflexible requirement of 30 days' advance notice could thwart important research because an astronomer may not know until making initial observations in other frequency ranges that he or she has a need to monitor frequencies in the range of Channel 64 and because a need might suddenly arise to monitor those frequencies in order to study phenomena that occur unpredictably, such as supernovae and unfamiliar comets; (b) as the NRAO's radio telescopes are in use 24 hours a day, strictly confining its right of preemption to the period between midnight and 6:00 a.m. would reduce available time for observation in the Channel 64 frequencies by 75 percent, thereby increasing the amount of time needed to complete research projects; and (c) the strict time-of-day limit would some-

times preclude observation of such phenomena as comets and supernovae, which do not always appear above the horizon between midnight and 6:00 a.m. 5 FCC Rcd at 969 ¶¶ 61-62. In conclusion, we agree with the ALJ that the public interest will be best served by denial of both of the pending applications.

21. ACCORDINGLY, IT IS ORDERED that the application for review filed by Achernar Broadcasting Company on November 29, 1990 IS DENIED and that the applications of Achernar and Lindsay Television, Inc. for a construction permit, File Nos. BPCT-860410KP and BPCT-860410KQ, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The same rule provides that upon receipt of an objection from the NRAO to a proposal to establish a new station in the Quiet Zone or to alter the facilities of an existing station therein the Commission "will consider all aspects of the problem and take whatever action is deemed appropriate."

[2] If anything, intervening developments suggest that the need for the policy is more pressing now than at its inception. We note from the findings, for instance, that Congress recently appropriated $75 million for improvements to Greenbank's radio astronomy facilities and that Greenbank is now the world's finest radio observatory, due to increasing interference elsewhere.

[3] If, as we hold, the benefit of the new service that Achernar would provide does not outweigh its potential adverse effect on the NRAO, then it is hardly to be found that Lindsay, which would interfere with the NRAO nearly as much as Achernar, would provide an offsetting benefit of overriding importance. Lindsay would provide far less service than Achernar. Its primary signal would reach 11,000 fewer people in underserved areas and less than one twelfth as many people overall.

[4] The Board did not expressly assign evidentiary burdens with respect to the remand issue, but it must be held that Lindsay bore the burden of persuading the agency that the benefits of its proposed operation would outweigh whatever detrimental effect it would evidently have on the NRAO. Under 47 U.S.C. §309(e), an applicant bears the burden of proof as to a hearing issue going to its qualifications that was not added in response to a petition to deny or enlarge issues, and the Board did not add the issue in question in response to a petition to deny or enlarge.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 6, 1991

Released: September 19, 1991

Ms. Gisela Huberman, Esq.
HVS Partners
1511 K Street, N.W., Suite 1100
Washington, D.C. 20005

Dear Ms. Huberman:

This is in reference to your request for a declaratory ruling, permitting HVS Partners (HVS), licensee of Station WLVW-AM, Salisbury, Maryland, to enter into a time brokerage agreement whereby it would become the broker for Gary Burns, Inc. (Burns), licensee of Station WDVH-FM, Salisbury, Maryland. The same parties also propose to enter into an identical time brokerage agreement between Stations WHBT-AM (HVS), Tallahassee, Florida, and WTMG-FM (Burns), Tallahassee, Florida.[1] The contour maps you submitted indicate that there is substantial overlap between the principal community contours of Stations WLVW and WDVH, and between the principal community contours of Stations WHBT and WTMG.

The proposed agreements are for a two-year term with an optional two-year renewal. Burns would have the option of terminating the agreement with at least 90 days notice to HVS, without incurring any further liability to HVS for such termination. Burns would make available its facilities 24 hours a day for up to 166 hours per week, except for downtime occasioned by routine maintenance, for the programming provided by HVS. HVS would provide an entertainment format, which may include news and public service programming, promotions, contests, and commercial matter. Burns would retain the right, without limitation, to suspend, cancel, or reject any programs not in accordance with its programming standards or the public interest. Burns may also preempt any of HVS's programs for programs deemed by Burns to be of greater national, regional, or local interest or importance, in case of an emergency, or to comply with federal, state, or local laws. HVS may terminate the agreement if Burns preempts or substitutes other programming for that supplied by HVS during fifteen percent or more of the total hours of operation during any calendar month. Burns would be solely responsible for ascertaining issues of community importance, addressing such issues through its own programming or HVS programming, and preparing the necessary issues/program lists. Furthermore, Burns would be solely responsible for maintaining the station logs and political and public inspection files, receiving and responding to telephone inquiries related to station operations, and broadcasting of proper station identification announcements.

HVS would retain all revenues from the sale of advertising time on the programs it delivers to Burns, and may sell advertising in combination for stations WLVW and WDVH, stations WHBT and WTMG, or any other broadcasting stations. Burns's personnel may be involved in the sale of advertising time on the programs delivered by HVS. Burns would retain the revenue from the sale of any advertising on WDVH and WTMG not produced or delivered to it by HVS. HVS would employ and be responsible for the salaries, commissions, taxes, insurance and all other related costs for all personnel involved in the production and broadcast of its programming on WDVH and WTMG. Subject to the control and oversight of Burns, HVS would establish, staff, and maintain remote control points for WDVH and WTMG. Whenever on the premises of WDVH or WTMG, HVS personnel would be subject to the supervision and direction of Burns's General Manager and/or Engineer. Both Burns and HVS would be in full compliance with the main studio staffing requirements set forth in *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991). In addition to being responsible for the costs of physical maintenance of WDVH and WTMG, Burns would be responsible for the salaries, taxes, insurance, and related costs of its own employees involved in the broadcast of HVS's programs.

The proposed agreements appear to comply with the Commission's time brokerage policy, as explained in *Roy R. Russo, Esquire*, 5 FCC Rcd 7586 (M.Med.Bur. 1990), and *Joseph A. Belisle, Esquire*, 5 FCC Rcd 7585 (M.Med.Bur. 1990) (*citing Part-Time Programming*, 82 FCC 2d 107 (1980) and *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1989)). *See also J. Dominic Monahan, Esq.*, 6 FCC Rcd 1867 (M.Med.Bur. 1991); *Peter D. O'Connell, Esq.*, 6 FCC Rcd 1869 (M.Med.Bur. 1991); and *Brian M. Madden, Esq.*, 6 FCC Rcd 1871 (M.Med.Bur. 1991). In *Russo* and *Belisle*, we permitted stations in the same market, or those with overlapping contours, to broker time on each others' stations, because there was no indication that the brokering station had or would obtain an undue amount of control over the brokered station or that, conversely, the brokered station had or would abdicate ultimate control in the areas of finances, personnel matters, and programming. *Russo*, *supra*, at 7587, *Belisle*, *supra*. *See also Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). Additionally, in removing time brokerage agreements from the purview of the cross-interest policy, the Commission neither set limits on the amount of time a brokered station could sell, nor on the amount of contour overlap between two stations entering into such agreements. With respect to the joint sale of advertising on both stations, the Commission eliminated its prohibition on joint sales practices in the 1986 "underbrush" proceeding. *Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500, 1515 (1986). Here, there is no indication on the face of the agreements that control over WDVH's or WTMG's operations would be an issue in the implementation thereof.

We will also reiterate the Commission's statement in *Reexamination of the Commission's Cross-Interest Policy*, *supra*, at 2214, that while we may approve a time brokerage agreement, the Justice Department may determine that the enforcement of antitrust laws is necessary to remedy an anticompetitive arrangement that may occur as a result of the implementation of a time brokerage agreement. Additionally, a station that airs brokered programming 24 hours per day, as proposed in this agreement, must nevertheless remain responsive to the needs of its community of license, or risk losing its license through

the denial of a renewal expectancy. *See Harriscope of Chicago, Inc.*, 5 FCC Rcd 6383, 6385 (1990) (licensee that eliminated nonentertainment and local programming by switching to STV operation not entitled to renewal expectancy). *See also Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1169 (Rev. Bd. 1983), *aff'd in relevant part*, 97 FCC 2d 61 (1984), *aff'd sub nom. Genesis Broadcasting Ltd. v. FCC*, 759 F.2d 969 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) (brokered station was entitled to strong preference for past programming, because it exercised adequate control over brokers and required inclusion of public service announcements and newscasts).

This caution applies with equal force to the licensee's compliance with the political programming laws. The licensee must oversee, and take ultimate responsibility for, the broker's advertising and programming practices with respect to the provision of equal opportunities, lowest unit charge and reasonable access to political candidates (47 U.S.C. § 315 and § 312(a)(7)), and compliance with the political rules embodied in Sections 73.1920, 73.1930, and 73.1940 of the Commission's Rules. *See Part-Time Programming*, 82 FCC 2d at 117.

It is important to note, however, that the Commission has issued a Notice of Proposed Rule Making that addresses a number of issues, many of which are raised in your time brokerage inquiry. *See Revision of Radio Rules and Policies*, MM Docket No. 91-140, 6 FCC Rcd 3275 (May 30, 1991). Among the issues addressed are: (1) in which markets should such agreements be permitted; (2) the number of permissible hours of common programming and advertising sales in relation to the market and contour overlaps; (3) the economic effects of such agreements on particular markets; (4) same-service versus cross-service agreements; (5) termination of such agreements; (6) possible reporting requirements concerning individual licensee compliance with Commission Rules; and (7) the effects of such agreements at license renewal time. Therefore, the Bureau's action in reviewing your time brokerage agreements is taken without prejudice to whatever action the Commission may take in its Rule Making.

Accordingly, your request for declaratory ruling IS HEREBY GRANTED, subject to the above caveats.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTE

[1] According to 1990 U.S. Census Bureau statistics, the population of Salisbury is 20,592; that of Tallahassee is 124,773. In addition to WLVW-AM and WDVH-FM, there are two AM stations, three commercial FM stations, and two noncommercial FM stations licensed to Salisbury. In addition to WHBT-AM and WTMG-FM, there are four AM stations, five commercial FM stations, and four noncommercial FM stations licensed to Tallahassee.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 9, 1991

Released: September 19, 1991

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Dennis H. Curley, President
CanXus Broadcasting Corporation
Permittee of Radio Station WCXU-FM
P.O. Box 937
Caribou, Maine 04736-0937

Dear Mr. Curley:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

This investigation resulted from both a complaint filed with the Mass Media Bureau's Enforcement Division and a Petition to Deny an assignment application filed with the Mass Media Bureau's Audio Services Division.[1] The complaint and Petition to Deny alleged that Colonial Broadcasting Company ("Colonial"), the licensee of Station WKZX-AM, Presque Isle, Maine, engaged in an unauthorized assignment of the license of Station WKZX to CanXus Broadcasting Corporation ("CanXus"), the permittee of Station WCXU-FM, Caribou, Maine; and that in the assignment application, Colonial and CanXus represented that the contract of sale submitted with the application contained the full and complete agreement between the assignor and assignee when, in fact, it did not.

In late August 1987, Colonial and CanXus entered into various written and oral agreements concerning the operation of Station WKZX-AM. Under one of these agreements, you, as the majority owner of CanXus, became the Vice-President of Colonial and General Manager of Station WKZX-AM. The other agreements, which were implemented immediately, included a program service agreement under which Station WKZX would simulcast much of the programming of WCXU-FM, and an agreement for joint sales of advertising by CanXus for both WKZX and WCXU. On January 19, 1988, Colonial and CanXus entered into a written agreement for the sale of WKZX from Colonial to CanXus. Six days later, on January 25, 1988, Colonial and CanXus filed an application seeking Commission consent to the assignment. (BAL-880125EA). The assignment application did not mention the management, programming, and advertising agreements between Colonial and CanXus that preceeded the formal sales agreement of January 19, 1988, even though two questions on the application specifically asked about the existence and terms of such agreements.[2]

In December 1987, one month prior to the filing of the assignment application, a complaint was filed with the Mass Media Bureau's Enforcement Division concerning the above-referenced matters. In March 1988, a Petition to Deny the application was filed by Timothy D. Martz. This Petition reiterated and expanded upon the allegations contained in the earlier-filed complaint. The entire matter was referred to the Bureau's Enforcement Division for investigation prior to the disposition of the assignment application. Letters of inquiry were directed to CanXus on March 7 and May 25, 1988. CanXus filed an Opposition to Petition to Deny on March 25, 1988, and a letter to Bureau staff attorney Gary Schonman on April 23, 1988, in response to the Reply to Opposition to Petition to Deny. CanXus responded to the Bureau's letters of inquiry on April 7 and June 24, 1988. On April 25, 1989, CanXus requested dismissal of the assignment application. That request was granted on May 15, 1989. Apparently, CanXus terminated its involvement in the operations of WKZX in April 1989. The investigation, however, continued. On November 28, 1989, the Bureau issued a Section 1.88 pre-designation letter to CanXus. [3] After receiving two extensions of time in which to respond, CanXus filed its response with the Bureau on February 5, 1990.

It appears that Colonial and CanXus engaged in an unauthorized assignment of the license of Station WKZX-AM to CanXus prior to obtaining Commission consent. Beginning in late August 1987, Colonial and CanXus entered into three interrelated agreements concerning the operations of Station WKZX-AM which, when viewed together, resulted in a de facto assignment of the station license prior to filing an assignment application or obtaining Commission consent to such an assignment.

The agreements between Colonial and CanXus apparently had their roots in repeated contacts between Gregory Freeman, the president of Colonial and you. You stated that as early as August 1986, Freeman contacted you about buying Station WKZX because of serious financial difficulties he was experiencing in operating the station. During the course of the next year, Freeman proposed various purchase arrangements to you, as you were initially interested in jointly operating WCXU and WKZX, and then became seriously interested in actually purchasing WKZX. You attempted to arrange financing for the purchase through your bank, but were unsuccessful. On August 16, 1987, you wrote a letter to Freeman explaining that CanXus could not proceed with the purchase of WKZX.

On August 28, 1987, you abruptly changed your mind and agreed to jointly operate WKZX and WCXU with the ultimate goal of acquiring the license of WKZX. You state that on August 28, 1987, Freeman informed you that unless "something" was done that day, WKZX would have to go dark by the end of the weekend. The situation had achieved a new sense of urgency because of the station's continuing financial losses and the impending resignation of Jerry Findlen, the manager of WKZX. Accordingly, you met with Freeman's broker, Mr. Stone, to discuss the principal terms of a "no cash" sale of WKZX from Colonial to CanXus. You and Freeman agreed upon a "deal in principle" which Mr. Stone "memorialized" in a letter to the parties dated August 29, 1987. Mr. Freeman further memorialized the management part of the agreement in a letter dated August 31, 1987, naming you the Vice President of Colonial Broadcasting Corporation and General Manager and Chief Operator of Station WKZX-AM.

The agreement dealt with the management, finances, and programming of Station WKZX-AM. Under the agreement, Colonial terminated all the employees of WKZX effective September 1, 1987. CanXus then offered employment to selected WKZX personnel for operational and sales functions. Although Freeman subsequently handled some personnel related paperwork, such as the 1988 Annual Employment Report, CanXus actually hired all employees of WKZX and apparently paid their salaries since, under the agreements, CanXus was responsible for all of WKZX's contractual obligations after September 1, 1987. In essence, you, who had just joined Colonial, were the only employee of Colonial Broadcasting left on the staff of WKZX. All other personnel of WKZX were CanXus employees. You stated that after September 1, 1987, there continued to be two separately staffed studios--WCXU-FM's in Caribou and WKZX-AM's in Presque Isle, but toward the end of the joint period of management, it was not always possible to staff the WKZX studio. Accordingly, WKZX signed off the air on several occasions.

Colonial and CanXus also entered into a programming agreement for WKZX which was briefly referred to in an August 29, 1987, "Memorandum of Understanding," and elaborated upon in another written agreement dated August 31, 1987. Under this agreement, which took effect September 1, 1987, WKZX rebroadcast a substantial amount of WCXU's programming, but Mr. Freeman of Colonial Broadcasting retained the right to reject programming and to make final programming decisions for WKZX. You maintained that Freeman regularly exercised his decision making authority and was integrally involved in determining what programming would appear on WKZX. In support of this assertion, you submitted a lengthy list of programming and other business decisions made by Freeman independently or after consultation with you. Although CanXus provided most of WKZX's programming, and some significant changes were made under your management, including a change of WKZX's network affiliation from ABC to NBC, Freeman allegedly maintained ultimate control over the programming of WKZX. Accordingly, the issue of programming control under these circumstances is not sufficient, in itself, to establish an unauthorized assignment of the license. However, when viewed in the overall context of the agreements between Colonial and CanXus, some portions of which clearly demonstrate an abdication of control by Colonial, the programming agreement supports a finding that an unauthorized assignment occurred.

One area which clearly demonstrates the unauthorized assumption of control of WKZX by CanXus involved the station's financial operations. The August 29, 1987, "Memorandum of Understanding" stated that Colonial would be responsible for all WKZX obligations incurred through August 31, 1987, and that CanXus would be responsible for all WKZX obligations incurred after that date. On page 12 of your response to the Section 1.88 letter, you stated that you and Freeman orally agreed that WKZX's mortgage payments, insurance, and real estate taxes due after August 31, 1987, would still be paid by Colonial. CanXus apparently paid the agreed upon WKZX expenses using CanXus checks imprinted with the name of WKZX. Furthermore, under this agreement, CanXus would collect all accounts receivable of WKZX through August 31, 1987, and would then repay this money to Colonial with interest. Such payments to Colonial were originally intended to commence in October 1987, but this time framework was later changed so that repayment would commence one month after the sale of the station to CanXus was closed. You explained that it was your understanding that these sums were to be collected by CanXus for Colonial to defray the operating expenses of WKZX, and that the revenues collected and the expenses paid would offset each other. You also stated your belief that any adjustment between WKZX revenue and expenses would only be a matter of a few hunded dollars since Colonial and CanXus intended to complete the assignment of the WKZX license by the end of 1987.

However, the assignment application was not filed until January 1988, and the financial operations of CanXus and WKZX became virtually indistinguishable within a short period of time after September 1, 1987. This co-mingling of funds also created difficulties in calculating the income tax for CanXus and Colonial. Because of these difficulties, CanXus improvised a formula for determining which advertising income was attributable to WCXU and which to WKZX. Accordingly, although Freeman apparently retained some degree of control in setting the advertising rates for WKZX, CanXus clearly controlled the actual finances of WKZX. This abdication of financial control by Colonial is indicative of an unauthorized assignment of the license of WKZX to CanXus.

Your public representations of CanXus' ownership and control of WKZX are also indicative of an unauthorized assignment of the station license to CanXus. According to an affidavit of Jerry L. Gagnon, a former employee of CanXus who was involved with WKZX, on August 31, 1987, you announced to Gagnon and WKZX employees that CanXus had filed documents with the Commission to transfer the license of WKZX, and that the transfer would be final within approximately 90 days. Furthermore, on August 31, 1987, CanXus and Colonial also issued a press release which announced the agreements involving WCXU and WKZX. At least two newspapers published articles based on this press release. One of these newspaper articles closely tracked the wording of the press release and conveyed the impression of an imminent transfer of the station license. Another newspaper article referred to the transfer as an accomplished fact. In addition, some listeners had the impression that CanXus owned WKZX. In a letter published in the *Fort Fairfield Review* on August 30, 1989, responding to one such listener, you denied that CanXus owned WKZX. The listener was apparently under the impression that CanXus owned WKZX, and had written to the newspaper about the programming and operations of WKZX.

Despite this denial, CanXus took several actions indicating that it was in control of WKZX. CanXus printed and used envelopes listing WCXU, WCXX, and WKZX as CanXus stations. CanXus also used "homemade" stationery consisting of cut and pasted station logos for WCXU, WCXX, and WKZX which were photocopied on CanXus letterhead. In November 1987, in response to a questionnaire for the 1988 *Broadcasting Yearbook*, you listed CanXus as the licensee of WKZX. As already discussed in connection with the financial management of WKZX, the name of WKZX was imprinted on checks drawn on the CanXus bank account. In a letter dated October 30, 1987, from you to an employee of WKZX concerning a programming proposal, you explicitly represented yourself as the license of WKZX. It is clear from the above written and oral representations that CanXus under stewardship

repeatedly held itself out to the public as the licensee of WKZX. In summary, based on the agreements between Colonial and CanXus, and CanXus' involvement in the management and operations of WKZX, it appears that Colonial and CanXus engaged in an unauthorized assignment of the license of WKZX, beginning in August 1987, and ending with the withdrawal of CanXus involvement in the spring of 1989.

Although CanXus made two misstatements to the Commission, it does not appear that these misstatements were made with the intent to deceive the Commission, and therefore do not constitute misrepresentations to the Commission. The first misstatement was made by CanXus, as well as by Colonial, in the assignment application filed on January 25, 1988. Question 5 of the assignor's portion of the assignment application directs the assignor to attach "a copy of the contract or agreement to assign the property and facilities of the station." The parties attached as Exhibit 1, the standard sales agreement between Colonial and CanXus dated January 19, 1988. Question 2 of the assignee's portion of the assignment application asks whether this contract "embody[s] the full and complete agreement between the assignor and assignee." CanXus answered this question "YES." In light of the various agreements reached between Colonial and CanXus in August 1987, the statements made on the assignment application about the completeness of the written sales agreement were incorrect.

A subsequent, but related, misstatement occurred in a letter dated April 23, 1988, from you to Bureau staff attorney Gary P. Schonman, who was then handling the case. In this letter, you claimed that the August 1987 meetings with Colonial's Freeman were focused on the survival of WKZX, not on its sale. Moreover, you claimed that the programming and management agreements of August 31, 1987, were entered into prior to, and independent of, a purchase agreement. In addition, you claimed that the oral agreement on joint rates reached on August 31, 1987, had nothing to do with the purchase agreement. You further stated that the purchase agreement was not concluded until January 19, 1988. These statements contradict the minutes of a meeting of the directors of CanXus held on September 22, 1987.

In your response to the Bureau's 1.88 Letter, you acknowledged that the asset purchase agreement submitted with the assignment application failed to mention the August 1987 agreements between Colonial and CanXus. By way of explanation, however, you stated that the written purchase agreement was not drafted by FCC counsel, but rather by a local general practice attorney who said he had been able to find a boilerplate model which he deemed appropriate for a broadcast transaction. You further stated that you " . . . considered the details regarding the purchase of WKZX(AM) to be a minor distraction from the more immediately overwhelming jobs of constructing WCXX(FM) in Madawaska, operating WCXU(FM) in Caribou, and doing what had to be done to keep WKZX(AM) on the air."[4] You further explained that you misunderstood the questions asked on the assignment application and did not consult FCC counsel in preparing the application.

You further explained that until you were preparing to go to Washington in March 1988 to discuss your response to the petition to deny the assignment application, you had not focused on whether the August 29, 1987, letter supplemented or was superseded by the asset purchase agreement that was executed on January 19, 1988. As part of your preparation for the Washington trip, you met with Freeman and Freeman's local counsel, Mr. Canders, in Presque Isle. You stated that you took the August 29, 1987, letter to the meeting and asked Mr. Canders if it needed to be filed or disclosed. You stated that you noted on the letter that Canders said the letter did not need to be filed because it was merely a "blueprint" for the subsequent contract and that the letter itself was unenforceable. You further stated that because of Cander's advice, you did not consider the matter again and did not raise it with your former FCC counsel when you and he met to discuss the response to the petition to deny.

With regard to the misstatement about the purpose of the August 1987 meetings made in the April 23, 1988, letter to Gary Schonman, you stated that you should have qualified your statement to say that the meetings were "more focused" on WKZX's surivival than its sale, and that you viewed the negotiations for an agreement and a final sales agreement as separate legal events. Accordingly, it appears that your misstatements resulted from imprecise wording, faulty reasoning, and carelessness than an intent to deceive the Commission. *See Intercontinental Radio, Inc.*, 98 FCC2d 608 (1984).

Consequently, in view of the above, pursuant to Section 503(b) of the Communications Act of 1934, as amended, you are hereby advised of your apparent liability for a forfeiture of ten thousand dollars ($10,000) for your apparent willful and repeated violation of Sections 310(d) of the Communications Act, and Section 73.3540 of the Commission's Rules. This amount was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, including the licensee's asserted good faith in its dealings with the Commission.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent pursuant to 47 C.F.R. §1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Both the complaint and the Petition to Deny the assignment application were filed by Timothy D. Martz, president of Four Seasons Communications, Inc., the licensee of Stations WDHP-FM, Presque Isle, Maine, and FM Translator W237AP, Madawaska, Maine.

[2] Question 5 of the assignor's portion of the assignment application directs the assignor to attach "a copy of the contract or agreement to assign the property and facilities of the station."

The parties attached as Exhibit 1, the standard sales agreement between Colonial and CanXus dated January 19, 1988. Question 2 of the assignee's portion of the assignment application asks whether this contract "embody[s] the full and complete agreement between the assignor and assignee." CanXus answered this question "YES."

[3] Under Section 1.88 of the Commission's Rules, in cases where an investigation is being conducted by the Commission in connection with the operation of a broadcast station, the licensee may file a written statement to the Commission setting forth its views with regard to the matter under investigation.

[4] On February 8, 1990, a complaint was filed with the Enforcement Division alleging that Station WCXX-FM, Madawaska, Maine does not maintain a main studio within its principal community contour as required by Section 73.1125 of the Commission's Rules. This complaint is currently under investigation by the Enforcement Division and no final determination has yet been made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. AAD 91-28

Expansion of the NECA Board to Include Two Directors from Outside the Telephone Industry

ORDER GRANTING WAIVER

Adopted: September 12, 1991 Released: September 13, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 28, 1991, the National Exchange Carrier Association, Inc. (NECA) filed a petition for waiver of Section 69.602 of the Commission's Rules [1] to permit the addition of two directors from outside the telephone industry to NECA's Board of Directors. Since we believe that the additional directors may increase public confidence in NECA's overall management and processes, this Order grants NECA's request to the extent it seeks authority to add two directors for the January 1, 1992 through December 31, 1992 term.

II. BACKGROUND

2. Section 69.602 of the Commission's Rules specifies that NECA's Board shall consist of fifteen directors, of whom three are to be selected by and represent the Bell Operating Companies, three are to be selected by and represent other telephone companies having annual operating revenues in excess of $40 million, and nine are to be selected by and represent telephone companies having annual operating revenues of less than $40 million. [2] These directors generally are elected for one-year terms that begin on the January 1 following their election.

3. The Commission's Rules do not state eligibility criteria for becoming a NECA director, and each NECA director has been a telephone company employee. [3] In a November 9, 1990 letter to NECA,[4] the Commission expressed concern with the apparent conduct of some of these directors. The Commission determined that several NECA directors had apparently participated in an attempt to manage the earnings of NECA's common line pool for 1988. The Commission indicated that these directors may have failed to discharge their responsibilities under Commission rules and that the NECA Board as a whole may have been insufficiently vigilant to restrain and disclose the actions of these directors. The Commission stated that it intended to consider expanding the NECA Board to include two or more members from outside the local exchange carrier (LEC) industry.

4. In response to the Commission's *November 9 Letter*, NECA filed both the subject petition for waiver and a petition for rulemaking. [5] Both petitions propose to expand the NECA Board to include two directors from outside the telephone industry. The petition for waiver proposes this expansion on an interim basis, beginning January 1, 1992, and extending until the Commission amends Section 69.602 to make that expansion permanent. The petition for rulemaking, which is pending before the Commission, proposes such an amendment. NECA states that it filed a petition for waiver as well as a petition for rulemaking to ensure that the directors could be added for the 1992 term.

III. DISCUSSION

A. The Parties' Positions

5. In its petition for waiver, NECA contends that it is paramount that the public have confidence in NECA's processes and overall management. While NECA maintains that its Board has always operated with integrity, NECA states that the requested waiver would provide immediate assurances that the NECA Board will fulfill its legal and fiduciary obligations in the future. NECA indicates that if the requested waiver is granted, NECA members would select the additional directors from a list of nominees provided by the NECA Board. According to NECA, these nominees would exclude current or former officers or employees of NECA or of NECA member companies, relations of such officers or employees, and persons having a business relationship or other interest that would interfere with the exercise of independent judgment as a director. NECA maintains that the addition of such directors to the NECA Board would provide valuable experience that should assist the Commission in evaluating NECA's petition for rulemaking.

6. Five parties filed comments on NECA's petition for waiver. [6] Four of these parties support that petition. Iowa commends NECA for initiating a self-review and states that the addition of directors who are not allied with the telephone industry, but who are knowledgeable of telephone regulatory policies, should improve the situation. NARUC maintains that the appointment of two independent directors to the NECA Board is a necessary first step towards restoring public confidence in and assuring ap-

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[1] 47 C.F.R. §69.602.
[2] *Id.*
[3] NECA Petition at 2.
[4] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990) (*November 9 Letter*).
[5] *See* NECA Petition for Rulemaking, RM 7736, filed May 24, 1991.
[6] The commenters are Beehive Telephone Co., Inc. (Beehive), the Iowa Utilities Board (Iowa), the National Association of Regulatory Utility Commissioners (NARUC), the National Telephone Cooperative Association (NTCA), and the United States Telephone Association (USTA). NECA filed a reply to the comments. Southwestern Bell Telephone Company (SWB) filed reply comments summarizing SWB's comments regarding NECA's petition for rulemaking and stating that, if the Commission adopts NECA's proposed rule change, SWB has no objection to the instant waiver petition.

propriate oversight of NECA's activities. NTCA urges that we grant the waiver expeditiously to enable NECA to solicit and screen potential nominees in sufficient time to include them on the ballot for the annual NECA Board election scheduled for November 6, 1991. USTA argues that the eligibility criteria NECA proposes are consistent with those of many publicly-held corporations and that we should not require that the NECA Board include individuals whose interests are at odds with those NECA exists to serve.

7. The remaining commenter, Beehive, maintains that the NECA Board has insufficient turnover and that the Commission should limit each Board member to a single term. Beehive also suggests that requiring NECA to make public "[t]he companies voting and the number of ballots cast for proposed directors per company" could give the Commission valuable insight into the attitudes of NECA members.[7]

B. Analysis

8. When the Commission created NECA in 1983, it anticipated that a Board composed exclusively of LEC representatives would provide sufficient assurances that NECA would discharge its obligations under Commission rules.[8] We now believe that the addition of two directors from outside the telephone industry may increase the assurance level. We also believe, however, that a waiver extending until the Commission rules on NECA's petition for rulemaking would be inappropriate and that we should now authorize the additional directors only for the January 1, 1992 through December 31, 1992 term. [9] Accordingly, we grant NECA's waiver request to the extent it seeks authority to add two such directors for that term. To ensure that NECA members will have an opportunity to choose among a range of qualified candidates, this waiver is conditioned upon NECA's Board nominating a total of five or more candidates for the two director positions and upon NECA's compliance with the eligibility criteria described in paragraph 5 of this Order.

9. In granting this waiver, we are persuaded that the concerns the Commission's *November 9 Letter* expressed regarding the apparent conduct of certain NECA directors and of the NECA Board as a whole warrant deviation from the Board structure specified in Section 69.602 and that such a deviation would serve the public interest. [10] We recognize that additional measures may prove necessary to ensure that NECA discharges its obligations under the Commission's rules. In this regard, we note that NECA will file reports on the studies its independent auditor is conducting in response to the *November 9 Letter*. [11] Upon receipt of those reports, the Commission will take whatever action it deems appropriate to ensure that NECA's policies, processes, and procedures are sufficient to ensure that NECA settlement figures reflect actual financial results as calculated in accordance with Commission rules.[12]

IV. ORDERING CLAUSE

10. Accordingly, pursuant to the authority contained in Sections 0.91 (a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed May 28, 1991, by the National Exchange Carrier Association, Inc., IS HEREBY GRANTED to the extent and subject to the conditions stated in paragraph 8 of this Order and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[7] Beehive Comments at 1.

[8] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 335 (1983); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135, 150 (1982).

[9] We anticipate that during the near future we will submit for Commission consideration a Notice of Proposed Rulemaking instituting a rulemaking proceeding regarding the composition of the NECA Board.

[10] *See* Northeast Cellular Telephone Co. v. FCC, 897 F. 2d 1164 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

[11] These studies are examining the accuracy of data reported to NECA for 1988 and 1989 as well as possible safeguards to ensure the accuracy of data reported to NECA in the future. *November 9 Letter*, 5 FCC Rcd at 7183.

[12] *Id.* The Commission's future examination of NECA may include consideration of eligibility criteria and selection procedures that differ from those NECA proposes for the additional directors. While certain parties to this proceeding and the proceeding on NECA's petition for rulemaking suggest alternatives in this regard, those alternatives are outside the scope of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules
regarding the operation of radio
frequency devices without an
individual license - Linear
petition for reconsideration

MEMORANDUM, OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 9, 1991; Released: September 20, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission denies the petition filed by Linear Corporation (Linear) on May 17, 1989, requesting partial reconsideration and clarification of the *First Report and Order* (*R&O*) in this proceeding.[1] The petitioner requests reconsideration of that portion of the *R&O* which expanded the number of restricted bands and required measurements above 2 GHz, as it affects control and security alarm devices. The Commission finds that the restricted bands and measurement requirements specified in the new Part 15 rules are appropriate and necessary to protect the authorized services from interference from the operation of non-licensed radio frequency equipment and that the changes requested by Linear are not warranted.

BACKGROUND

2. In the *R&O*, the Commission adopted a comprehensive revision of Part 15 of the rules. These rules govern radio frequency devices that may be operated without an individual license. The objective of this revision was to encourage more effective use of the radio frequency spectrum by providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices. As part of this revision, the Commission, *inter alia*, increased the number of frequencies available for the operation of Part 15 intentional radiators[2] and established a number of frequency bands where emissions from Part 15 intentional radiators are restricted.[3] These restricted bands were established to protect against interference to services involving safety-of-life, U.S. Government operations and services that use very low received signal levels. Intentional radiators may not be designed for operation in the restricted bands.

3. Further, the Commission established strict limits for spurious, including harmonic, emissions from such devices that fall in the restricted bands.[4] Most transmitters generate spurious emissions, which include harmonic signals that fall on integer multiples of the frequency of operation. For example, the tenth harmonic occurs at ten times the transmitter's operating frequency. In order to ensure that emissions in the restricted bands are attenuated as required and to provide additional protection to authorized services against interference from Part 15 devices, the Commission also increased the frequency range over which measurements must be performed for most Part 15 transmitters. Section 15.33(a) of the new rules requires measurements to at least the tenth harmonic of the device's highest operating frequency or 40 GHz, whichever is lower.[5] Many control and security alarm devices operate on frequencies between 300 MHz and 420 MHz. Thus, measurements of these devices must be performed up to 4.2 GHz for some transmitters. The Commission indicated that the current measurement procedure used for control and security alarm devices, MP-1, is to be employed until a new measurement procedure for these devices is developed.[6] To allow manufacturers sufficient time to incorporate these changes, the Commission adopted a three-year transition period for existing equipment.[7]

THE LINEAR PETITION AND RELATED FILINGS

4. Linear Corporation (Linear), a manufacturer of control and security alarm devices, requests partial reconsideration of the restricted bands and measurement requirements imposed by the *R&O*.[8] Linear states that these elements of the new rules, as adopted, will cause a great economic impact on the future production of Part 15 devices.

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[1] *See First Report and Order*, GEN Docket No. 87-389, adopted March 30, 1989, 4 FCC Rcd 3493 (1989).

[2] An intentional radiator is a device that intentionally generates and emits radio frequency energy by radiation or induction.

[3] *See* 47 C.F.R. Section 15.205.

[4] *See* 47 C.F.R. Sections 15.205 and 15.209.

[5] *See* 47 C.F.R. Section 15.33(a). Under Section 15.142 and 15.215 of the former rules, *i.e.*, those in effect prior to implementation of the *First Report and Order* on June 23, 1989, transmitters operating on frequencies up to 500 MHz were required to be measured only up to 2 GHz.

[6] As specified in 47 C.F.R. Section 15.31, control and security alarm devices operating under Part 15 are tested in accordance with FCC/OST MP-1 (1983), "FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers."

[7] *See* 47 C.F.R. Section 15.37. These transition provisions allow a manufacturer to produce equipment under the former regulations. Applications for equipment authorization under the former regulations must be submitted before June 23, 1992. Manufacture and importation under the former rules must cease prior to June 23, 1994.

[8] We are hereby addressing both Linear's petition filed May 19, 1989, and its amendment filed on September 25, 1989. Linear also filed a Petition for Stay of those portions of the rules addressed herein, which the Commission denied. *See Order Denying Petitions for Stay*, GEN Docket No. 87-389, 4 FCC Rcd 7869 (1989). Subsequently, Linear filed a Petition for Partial Reconsideration of the *Order Denying Petitions for Stay*, which the Commission also denied. *See* 5 FCC Rcd 1110 (1990).

5. Linear believes the Commission has not adequately justified the need for restricting Part 15 operations in each restricted frequency band, and expresses concern about the number of restricted bands established to protect the radio astronomy service. Linear believes that the public interest would be better served by reallocating the spectrum now allocated to radio astronomy to services that could be used to assist people in providing home security, safety against fire, audio assistance, home entertainment and a myriad of other functional uses. Linear also argues that the Commission's reference to national security as a basis for some of the restricted bands is unsupported by any comments in the record for this proceeding and is, therefore, inappropriate. Linear suggests that the emission limits imposed in the restricted band limits are unnecessarily severe in light of the fact that other devices operating under Parts 18, 22, and 90 of the Commission's rules are permitted to emit far greater amounts of electromagnetic energy on the same frequencies.[9] Linear further contends that, in calculating the interference potential of signals above 2 GHz, the Commission ignored the effect of propagation losses on such high frequency radio waves.

6. Linear next argues that the Commission provided no rational basis for requiring testing of Part 15 devices at frequencies above 2 GHz, as specified in Section 15.33. Linear argues that the large number of new restricted bands makes it impossible for a manufacturer of a control and security device, which operates below 500 MHz, to avoid having at least one harmonic falling within the restricted band below 2 GHz. Thus, Linear concludes that measurements above 2 GHz are unnecessary because, if the emission limits are met at lower harmonics falling in the restricted bands, the higher harmonics above 2 GHz will also be in compliance. Linear believes that the burden on applicants of making measurements above 2 GHz is not justified.

7. Linear further maintains that the Commission has not established an accepted method for making open field measurements above 2 GHz. It argues that the lack of adequate measurement procedures places an unreasonable burden on Part 15 device manufacturers who do not know what method of testing will be acceptable to demonstrate compliance with the rules. Linear urges the Commission to delay the requirements of Section 15.33 until three years from the date that measurement procedures are formally adopted.

8. Finally, Linear requests that the Commission clarify the identity and the method of measurement to be employed when using an average detector to make compliance measurements.[10] Linear states that although the Commission described an average detector in the text of the *R&O*, the rules are unclear on exactly what type of measuring instrument, adjusted in what manner, is acceptable.

9. Comments were filed by the National Academy of Science's Committee on Radio Frequencies (CORF), by the Spectrum Measurement Corporation (SMC), and by the American Telephone and Telegraph Company (AT&T). CORF strongly opposes Linear's petition as it pertains to the restricted bands. It argues that restricting Part 15 usage to protect the radio astronomy service is in the public interest. CORF states that radio astronomers use radio receivers that are among the most sensitive in the world to receive signals from celestial radio sources ranging up to billions of light years away. CORF submits that it is in the public interest to have rules that protect radio astronomers because the data gathered as a result of their studies is essential to science and has contributed significantly to major advances in many areas. CORF also suggests that it is reasonable to have limits for Part 15 devices that are different from those for authorized services, as it is easier to resolve interference resulting from operations in authorized services. Finally, CORF contends that the measurement requirements in Section 15.33 should not be changed.

10. AT&T and SMC generally support Linear's petition. AT&T states that measurements of control and security alarm devices at frequencies above 2 GHz seem unnecessary because spurious emissions will be virtually undetectable on those frequencies. AT&T also indicates that it is expensive to make measurements above 1 GHz. AT&T suggests that the requirements for measurements above 1 GHz be deferred, for control and security alarm devices, until the Commission provides guidance on acceptable measurement procedures. SMC questions whether the restricted bands were developed with adequate technical analysis and foundation. SMC states that low-powered control and security alarm devices operating on frequencies less than 500 MHz under Part 15 are unlikely to cause interference above 2 GHz and that, from its theoretical analysis and practical experience, all emissions over the fourth harmonic will be significantly below the noise floor level. Accordingly, it objects to the new requirement for measurements of this equipment above 2 GHz. Nevertheless, SMC does not share Linear's concern that the existing measurement procedures are inadequate. SMC suggests that, even though specific FCC test procedures may not apply above 1 GHz, there are recognized standards of good engineering and measurement practices that could be used. SMC points out that the Commission has indicated many times that it will accept any reasonable test procedure that can be shown to be technically correct and consistent with accepted practice.

11. In reply comments, Linear reasserts its earlier arguments in responding to CORF's comments. It argues that the Commission should reconsider the amount of interference protection that should be provided to radio astronomy facilities. Linear further submits that the Commission failed to comply with the Administrative Procedures Act because the *Notice of Proposed Rule Making* (*NPRM*) in this proceeding did not adequately discuss the relevant factors that were to be considered with regard to the restricted bands.[11]

12. On September 25, 1989, Linear filed an amendment to its petition. In this amendment, Linear points out that the Commission proposed, in GEN Docket No. 89-117, a test procedure for measuring the emissions from periodic

[9] Part 18 specifies radio noise limits designed to control interference that can be caused by industrial, scientific, and medical equipment. Part 22 contains the requirements for the domestic public land mobile radio service. Part 90 contains the requirements for the private land mobile radio service.

[10] Section 15.209(d) of the Commission's rules specifies the use of an "average detector" for making measurements within certain frequency bands.

[11] *See Notice of Proposed Rule Making*, General Docket No. 87-389, 2 FCC Rcd 6135 (1987).

transmitters, such as those used for control and security alarms.[12] Based on that proposal, Linear estimates that the cost of equipment required to perform testing above 2 GHz would approach $50,000, and therefore, argues that the cost of testing above 2 GHz up to the tenth harmonic is not justifiable for all Part 15 devices. CORF filed comments opposing Linear's amendment, stating that the cost of the test equipment will not be a burden to every manufacturer of Part 15 transmitters. CORF suggests that manufacturers will rely on test laboratories to make such measurements, and that the cost will be spread over thousands of Part 15 devices, resulting in a negligible price impact on the consumer. In reply, Linear indicates that test laboratory fees will be even more expensive than performing its own tests.

13. On August 15, 1990, the Linear petition and amendment were referred to the United States Department of Commerce, National Telecommunications and Information Administration (NTIA) for comment. NTIA has responsibility for coordinating and authorizing radio frequencies used by the federal government.[13] NTIA responded that it believes the number and composition of restricted bands should be maintained as adopted in the *R&O* in order to protect authorized government and non-government radio services.[14] In addition, NTIA believes it is important that measurements of non-licensed devices be made on frequencies up through the tenth harmonic.

DISCUSSION

14. *Restricted Bands.* In both the *NPRM* and the *R&O*, we indicated the criteria that justified establishing restricted bands: the frequencies were allocated for services involving safety-of-life[15] and for services that utilize very low received signal levels, including radio astronomy and satellite down-links.[16] We continue to believe these interests warrant the special protection from possible interference from Part 15 intentional radiators that is afforded by the restricted bands. The restricted bands also include certain frequencies that may be used by the U.S. Government for national security purposes. These frequencies were restricted based on coordination with NTIA. NTIA's comments describing general reasons for restricting certain bands were included in the record of this proceeding. The inclusion of more detailed information in the record could subject vital national security systems to risk and compromise. We continue to believe that national security is sufficient reason to justify designation of specific frequencies as a restricted band.

15. Linear questions the number of restricted bands allocated for radio astronomy. We recognize that the new rules have added many new restricted frequency bands for control and security alarm devices. This is only natural because new authorized uses of spectrum have developed since those restricted bands were last changed. This *R&O* did not allocate spectrum. Rather the Commission applied its restricted band criteria to expand interference protection to already established allocations. Whether these frequencies should be allocated to radio astronomy is beyond the scope of this proceeding.

16. We recognize that other radio services are permitted higher emission limits in the restricted bands than Part 15 devices. However, this is entirely appropriate given the different operating characteristics and conditions of the authorized services: 1) transmitters in authorized services are licensed so the locations of these transmitters are known and interference they might cause can be more easily traced and resolved; 2) license applications are placed on public notice for comment and are frequency coordinated to avoid interference; 3) transmitters in the authorized services and Part 18 commercial equipment typically employ substantially more power than Part 15 devices and, therefore, suppression of spurious emissions to the same levels as Part 15 devices would be extremely burdensome both technically and economically; 4) Part 15 products, which are often mass-produced for consumers, are far more numerous than authorized transmitters; and 5) we cannot control Part 15 device locations. Accordingly, we continue to believe that the suppression of emissions in the restricted bands, as required by the new Part 15 rules, is necessary and constitutes sound spectrum management.

17. We also believe that the limits on spurious emissions we have specified for the restricted bands are appropriate. The current limit on spurious emissions in the restricted bands is the same for all frequencies greater than 1 GHz. As pointed out by Linear and SMC, propagation losses and other factors may make it possible for devices operating on frequencies above 2 GHz to radiate higher levels of spurious emissions limits without increasing the interference potential. However, in order to ensure the prevention of harmful interference our propagation assumptions above 2 GHz were conservative. Nevertheless, Linear has failed to provide sufficient new information to show that those assumptions are incorrect and that the limits above 2 GHz are inappropriate and should be relaxed.

18. *Measurement Requirements.* We disagree with the claim made by Linear, AT&T, and SMC that measurements above 2 GHz are unnecessary. We recognize that transmitters having low emissions on the second through fourth harmonics typically have low emissions on higher-order harmonics. This is not always the case, however. We have found, as part of our pre-grant sampling program, some control and security alarm devices operating in the range of 295 - 450 MHz with fifth, sixth, seventh, and eighth harmonic emission levels appreciably stronger than those for second and third harmonics. These higher-order harmonics in many cases fell on frequencies above 2 GHz. Many control and security alarm devices operate with very small antennas that actually have more gain on the higher harmonic frequencies than on the operating

[12] *See Notice of Proposed Rule Making,* General Docket No. 89-117, 4 FCC Rcd 5174 (1989). Linear and other interested parties have been provided an opportunity to comment in that proceeding.

[13] The restricted bands that were proposed and adopted in this proceeding were developed in cooperation with NTIA.

[14] *See* NTIA comments filed November 27, 1990. Receipt of these comments was announced in FCC Public Notice #10867. No filings have been received in response to NTIA's comments.

[15] An example of safety-of-life services is aeronautical radionavigation, which is intended for the safe operation of aircraft.

[16] *See NPRM, supra.*, at para. 18. *See also R&O, supra.*, at para. 61.

frequency. Therefore, we continue to believe that measurements above 2 GHz and up to at least the tenth harmonic are necessary in order to insure compliance with our emission requirements and to insure interference protection to safety-of-life services and services with low received signal levels. These requirements are also consistent with regulations applied to other types of communications transmitters.[17]

19. We recognize Linear's and AT&T's concerns about the cost of the equipment that is necessary to make measurements above 2 GHz. However, we believe the interference potential of Part 15 devices warrants the additional measurement expense. We also observe that manufacturers can generally spread the $25,000 to $75,000 cost of this equipment over several products. Alternatively, they can opt to have the measurements performed by an independent test laboratory.[18] Thus, we believe the cost of measurements above 2 GHz can be made minimal.

20. *Measurement Procedures.* We also disagree with Linear's contention that the Commission has not established an accepted method for making open field measurements of Part 15 devices above 2 GHz. We continue to believe that our measurement procedures above 2 GHz are sufficiently well-defined to allow reliable, repeatable compliance measurements to be performed. The measurement procedure specified in Section 15.31 for use with control and security alarm devices, MP-1, was used under the former rules for measurements up to 5 GHz.[19] Although OET Bulletin No. 55 only discusses calibration of open field test sites for frequencies up to 1 GHz, it has been our experience that, at frequencies above 1 GHz, any errors introduced by the use of a test site calibrated in accordance with this bulletin are negligible. Thus, any test site satisfying the criteria in OET Bulletin No. 55 would be acceptable for measurements above 1 GHz.

21. Although the Commission is considering adopting a new measurement procedure to reflect features in the new rules, the proposed new measurement procedure was not developed because of changes to the standards. Rather, the new measurement procedure was proposed to provide additional clarity as to how the Commission measures the emissions from control and security alarm devices.[20] Thus, the use of the current measurement procedure, MP-1, or the introduction of the new measurement procedure should not impede the ability of manufacturers to design equipment to meet the technical standards contained in the new Part 15 rules.

22. *Average Detector.* We believe we have provided sufficient guidance on how to make average measurements, including the instrumentation to be used and how it is to be adjusted. For example, Section 15.35(c) of the rules provides guidance on how to make average measurements of pulsed signals, such as those used by control and security alarm devices. Section 15.231(b), which applies to most control and security alarm devices, contains additional information. Also, MP-1 provides information on measuring average values as well as measuring instrumentation and adjustments.[21] We note that the former rules required the use of average measurements and that, based on the comments of Linear and other manufacturers, we continued to require average measurements for most frequencies, including those in the restricted bands above 1 GHz, as specified in Section 15.209(d).

23. *Procedural Concerns.* Contrary to Linear's claim, we find that the *NPRM* provided adequate notice of the Commission's intention to adopt the restricted bands and invited comments on their suitability.[22] Many commenters, including Linear, addressed this issue. Their comments and positions were discussed in the *R&O*. [23] Similarly, the *NPRM* proposed the frequency range over which measurements would be required.[24] Again, Linear and others provided comments that were discussed in the *R&O*.[25] Our decisions were discussed fully in the *R&O* and were well-supported by the record. Accordingly, we reject Linear's claim that we failed to comply with the Administrative Procedures Act.

24. In conclusion, we find that Linear has not produced any additional information that would warrant the Commission reversing or modifying any of its decisions relevant to this matter. To the contrary, the information in this proceeding has indicated that there are safety-of-life services and other services which operate with low received signal levels for which protection is necessary, that measurements are in fact necessary, and that valid test procedures are available above 2 GHz. Consequently, the public interest would not be served by granting Linear's request.

ORDERING CLAUSES

25. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304, 307 and 405 of the Communications Act of 1934, as amended, IT IS ORDERED that the Petition for Partial Reconsideration filed by Linear Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[17] *See* 47 C.F.R. Section 2.997. *See also R&O, supra.*, at para. 98.

[18] The Commission maintains a list of firms that have submitted the information required by the FCC rules for measuring specific types of devices subject to the requirements in Part 15. *See* FCC "Contract Test Sites on File", issued monthly and available from the FCC Lab; 7435 Oakland Mills Rd.; Columbia, MD 21046.

[19] *See* former Sections 15.142 and 15.215.

[20] The *Notice* stated that we will continue to employ the existing measurement procedures for periodic emitters, except spread spectrum, and associated receivers pending the adoption of the new TP-6. *See Notice of Proposed Rulemaking*, GEN Docket No. 89-117, 4 FCC Rcd 5174 (1989), at paragraph 6.

[21] *See* MP-1, *supra.*, Section 4.2.2.

[22] *See NPRM, supra.*, at para. 18 through 24.

[23] *See R&O, supra.*, at para. 61 through 74.

[24] *See* proposed rule Section 15.35 in *NPRM, supra.*

[25] *See R&O, supra.*, at para. 96 through 98.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-269

In the Matter of

Amendment of Part 15 to Enable the Widespread Implementation of Home Automation and Communication Technology — RM-7296

NOTICE OF PROPOSED RULE MAKING

Adopted: September 10, 1991 Released: September 20, 1991

Comment Date: December 9, 1991
Reply Comment Date: January 8, 1992

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend Part 15 of its rules to enable the introduction of home automation and communication systems. These systems are designed to integrate communications and control systems within the home environment, and will bring new levels of convenience to the American public. This proposal addresses petitions for rule making before the Commission filed by the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG") on February 21, 1990, and Smart House Limited Partnership ("Smart House") on June 20, 1990.

BACKGROUND

2. Industry has spent several years developing standards and technologies that take a new approach to communications systems intended for use in residences. Currently, consumers have available a variety of separate communications devices intended for home use, such as remote appliance and lighting controls, wireless security alarms, intercoms, etc. Several companies promise substantial benefits with systems that integrate a variety of these functions. For example, a single system could be used to help prevent fire and theft, to efficiently control the energy use of household appliances, and to distribute radio and television signals throughout a home. EIA/CEG and Smart House each filed petitions seeking to modify current regulations that they believe pose impediments to the introduction of this technology.

EIA/CEG PETITION

3. EIA/CEG states that its home automation system uses the home's AC power lines as communications links between components of the system. Such systems are regulated as carrier current systems, as defined in Section 15.3(f) of the Commission's rules.[1] EIA/CEG states that its standard calls for use of carrier current frequencies below 450 kHz. EIA/CEG notes that, under the current rules, carrier current systems using frequencies below 450 kHz are subject to a conducted limit of 250 microvolts.[2] According to the petitioner, this limit cannot be met economically. Moreover, EIA/CEG notes that the Commission completely exempts from any conducted limits, carrier current systems operating on frequencies above 450 kHz. EIA/CEG asserts that there is no reason for treating carrier current systems using frequencies below 450 kHz differently from those using frequencies above 450 kHz. While EIA/CEG notes that it could move its carrier current operations above 450 kHz, system performance would suffer and the potential for interference to AM radio would be greater.[3] A test report submitted by EIA/CEG with its petition indicates that the proposed carrier current system, operating below 450 kHz, would not interfere with AM radio. Accordingly, EIA/CEG requests that carrier current systems operating below 450 kHz be exempted from the present limits on conducted emissions.

4. Only one party responded to the EIA/CEG petition. Echelon Corporation ("Echelon") submitted late-filed comments along with a technical study that purported to show that EIA/CEG's system would result in harmful interference to AM broadcasting. EIA/CEG replied to Echelon's comments with a study demonstrating that such interference does not occur when carrier current conducted emissions are below 1000 microvolts in the AM band. EIA/CEG states that it is willing to accept as a compromise a limit of 1000 microvolts for spurious and harmonic emissions in the AM band. The National Association of Broadcasters (NAB) also submitted a reply to Echelon supporting a conducted limit of 1000 microvolts in the AM band for non-broadcast carrier current systems. Adaptive Networks, Inc., CyberLYNX, Intellon Corporation, and X-10 (USA), Inc. replied to Echelon's comment by indicating that they did not believe the change proposed by EIA/CEG posed a risk of interference. Bonneville International Corporation filed reply comments in support of Echelon's position, claiming that EIA/CEG's original test results were not valid because the tests were conducted in an area where there were no AM stations operating on harmonic frequencies of the signal under test.

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[1] *See* 47 CFR Section 15.3(f).

[2] This limit applies to spurious and harmonic emissions conducted on the AC power lines between 450 kHz and 30 MHz. *See* 47 CFR Sections 15.107 and 15.207.

[3] When a carrier current system operates below 450 kHz, only spurious and harmonic emissions fall in the AM broadcast band. Section 15.209(c) requires that such emissions be weaker than the signal on the fundamental operating frequency. Thus, a carrier current system operating in the AM broadcast band is more likely to cause interference to AM reception than if it operates on other frequencies. In any case, Section 15.5(b) prohibits Part 15 devices from causing harmful interference to authorized radio services.

SMART HOUSE PETITION

5. In its petition, Smart House states that it is designing a home automation system that uses coaxial cable as the communications link between video sources, such as television receiving antennas, cable television systems, video cassette recorders, and television sets located throughout a home. Because the signals transmitted on the cable are intended to be received by standard TV receivers, this part of the system falls under the definition of a TV Interface Device (TVID) and is regulated under Part 15 of the rules. Smart House contends that the general TVID output signal limit contained in Part 15 is not high enough to ensure reliable distribution of television signals throughout a home. Smart House notes that a 6 dB higher limit on output signals is permitted for TVIDs used as master antenna systems, and it contends that its system is in fact used as a master antenna system.[4] The TVID regulations describe a master antenna system as including central distribution video systems in apartment or office buildings.[5]

DISCUSSION

6. We recognize that there is considerable interest in the new technology offered by home automation and communication systems. It appears that we are on the threshold of mass introduction of such systems. In the future, home communication systems may be as much an integral part of the home as plumbing, heating and electrical systems. This important development will be of sizeable benefit to the public. We are initiating this rule making looking toward removal of unnecessary impediments to these systems while examining potential concerns about interference, particularly to AM broadcasting.

7. With regard to the EIA/CEG petition, we note that there had been no intent to exclude carrier current systems operating below 450 kHz from the exemption from power line conducted emissions requirements. This was simply an oversight in crafting the regulations. The rationale for the exemption was that these systems are already covered by limits on radiated emissions as described in Sections 15.107(c) and 15.207(b). Radiated emissions emanating from the power line are the principal interference mechanism for carrier current systems. Thus, power line conducted emissions requirements were deemed unnecessary.

8. The Echelon and EIA/CEG studies show that radio frequency signals, conducted through the AC power lines into the power supply of an AM receiver, are capable of causing interference to AM broadcasting. However, the studies do not provide any information as to the levels of radiated emissions caused by the emissions conducted on and radiated from the power line. Thus, we are unable to determine whether our radiated emissions limits would have proven sufficient to control the interference found in the tests. In any event, we consider protection of AM broadcasting against interference to be a high priority. A limit on conducted emissions, in addition to our current radiated emissions limits, would provide added assurance against interference to AM broadcasting. We believe the EIA/CEG study more accurately represents the interference potential of home automation systems. Accordingly, we are proposing to limit AC power line conducted emissions from home automation and communication systems to 1000 microvolts in the AM broadcasting band (535-1705 kHz), as recommended by EIA/CEG and NAB.[6] We invite comment on this proposal.

9. We find no basis for excluding other carrier current systems from this same limit. Accordingly, we are also proposing to extend our proposal to encompass all carrier current systems having emissions falling in the AM broadcasting band. However, this limit would not apply to transmissions intended for reception by AM broadcast receivers, such as those of low-power broadcast and campus radio stations, because they represent desirable communication signals.[7] We also are not applying this limit to power line carrier systems because experience has shown that the existing requirements are adequate.[8] We invite comment on whether the proposed conducted limit may be necessary only for carrier current systems used in residential environments. The greater separation between carrier current systems and AM receivers in business and industrial environments may obviate the need for a conducted limit.

10. The Smart House petition calls to light the need to clarify our description of a master antenna system in the TVID rules. The current rules suggest that only video distribution systems in large buildings, such as hospitals, office buildings, and apartment buildings, qualify as master antenna systems. We note that systems are now being developed that are: 1) used to distribute multiple television signals at the same time; 2) located some distance from TV receivers, with signals routed through buildings by cable, similar to a home cable television distribution system (in contrast, a conventional TVID, such as a VCR, normally would be employed near the TV receiver); 3) designed to supply the video signals to all TV broadcast receivers in the buildings in which they are installed; and, 4) supply all of the over-the-air and cable signals so there is little likelihood that the systems would require the use of any other receiving antennas. We are proposing to amend Section 15.115(b)(3) of the rules to state that the term master antenna refers to TV interface devices employed for such central distribution systems.[9] We believe the TVID master antenna standards will provide adequate interference protection in residences. However, in view of the impending widespread distribution of home automation and communication systems, we are taking this op-

[4] On April 11, 1991, the Chief Engineer issued an interpretation of the rules that allows Smart House's system to be considered a master antenna system. *See* letter dated April 11, 1991, from Chief Engineer to Smart House. Smart House was advised that this ruling may be modified depending on the outcome of a rule making on this subject. In light of this interpretation, the Smart House petition was not put on public notice for comment. The petition is, however, being incorporated in the record for this proceeding.

[5] *See* 47 CFR Section 15.115(b)(3).

[6] The procedure for measuring conducted emissions is described in FCC/OET MP-4. Additional measurement procedures are contained in Section 15.31. *See* 47 CFR Section 15.31.

[7] *See* 47 CFR Section 15.221.

[8] *See* 47 CFR Section 15.113.

[9] We recognize that some video distribution systems may not meet all of these criteria (for example, they may only distribute one or two channels), and we invite comment as to whether these systems should also be treated as master antenna systems.

portunity to invite comment on the adequacy of the limits. We also solicit comment on whether it is necessary to maintain the lower limit for TVIDs that are designed to serve only one TV receiver, such as video cassette recorders. A single limit could avoid confusion that may result in attempting to determine whether a TVID is designed to serve only one or multiple TV receivers. While we are not proposing to change the output limits for TVIDs to match those of master antennas, we note that if we were to do this, it may be appropriate to change the TVID transfer switch requirements to match those of master antennas as well.

11. The specific proposed rule amendments are shown in the Appendix.

PROCEDURAL MATTERS

12. *Initial Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the Commission's initial analysis is as follows:

I. Reason for Action: The rules regarding carrier current systems, as well as those for TV interface devices, are inconsistent. As a result, they are hindering the development of advanced home automation systems, thereby depriving the general public of the potential benefits of these systems.

II. Objective: The objective of the proposed rules is to clarify some of the regulations that affect advanced home automation systems, thus encouraging the development of such systems to the ultimate advantage of the general public.

III. Legal Basis: Action is proposed in accordance with Sections 4(i), 302, 303(e), 303(f), 303(g), 303(r) and 303(s) of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected: The proposed changes in the regulations would affect a maximum of 50 small entities. Manufacturers producing carrier current systems that are not for use in conjunction with standard AM broadcast receivers, and that have conducted emissions in the 535 kHz - 1705 kHz band in excess of 1000 microvolts, will be required to reduce their conducted emissions in the AM broadcast band. This could result in some expense to these manufacturers. There would be no cost to manufacturers of AM broadcast carrier current systems and power line carrier systems because they would not be required to make any changes to their current operations.

V. Recording, record keeping and other compliance requirements: All carrier current transmitters not intended for use in conjunction with AM broadcast receivers would be required to demonstrate that conducted emissions in the 535 kHz - 1705 kHz band do not exceed 1000 microvolts.

VI. Federal rules that overlap, duplicate or conflict with the proposed rule: None.

VII. Any significant alternative minimizing the impact on small entities and consistent with the stated objectives: None.

13. *Comment Provisions.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before **December 9, 1991** and reply comments on or before **January 8, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

14. *Ex Parte Rules-Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

15. For further information on this proceeding contact David Wilson, Technical Standards Branch, Office of Engineering and Technology, 202-653-8138.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 15 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

PART 15 - RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, and 307.

2. Section 15.107 is amended by revising paragraph (c) to read as follows:

Section 15.107 Conducted limits.

* * * * *

(c) The limits shown in paragraphs (a) and (b) of this Section shall not apply to carrier current systems operating as unintentional radiators on frequencies below 30 MHz. In lieu thereof, these carrier current systems shall be subject to the following standards:

(1) For carrier current systems containing their fundamental emission within the frequency band 535-1705 kHz and intended to be received using a standard AM broadcast receiver: no limit on conducted emissions.

(2) For all other carrier current systems: 1000 uV within the frequency band 535-1705 kHz.

(3) Carrier current systems operating below 30 MHz are also subject to the radiated emission limits in Section 15.109(e).

* * * * *

3. Section 15.115(b)(3) is revised to read as follows:

Section 15.115 TV interface devices, including cable system terminal devices.

* * * * *

(b)* * *

(3) The term "master antenna" used in this paragraph refers to TV interface devices employed for central distribution within a building. Such TV interface devices must be designed to: 1) distribute multiple television signals at the same time; 2) distribute such signals by cable to all TV broadcast receivers in the building in which they are installed; and 3) distribute all over-the-air and, if appropriate, cable signals. Note: Cable-ready video cassette recorders continue to be subject to the provisions for general TV interface devices.

* * * * *

4. Section 15.207(b) is amended by revising paragraph (b) to read as follows:

Section 15.207 Conducted limits.

* * * * *

(b) The limit shown in paragraph (a) of this Section shall not apply to carrier current systems operating as intentional radiators on frequencies below 30 MHz. In lieu thereof, these carrier current systems shall be subject to the following standards:

(1) For carrier current systems containing their fundamental emission within the frequency band 535-1705 kHz and intended to be received using a standard AM broadcast receiver: no limit on conducted emissions.

(2) For all other carrier current systems: 1000 uV within the frequency band 535-1705 kHz.

(3) Carrier current systems operating below 30 MHz are also subject to the radiated emission limits in Section 15.205 and Section 15.209, 15.221, 15.223, 15.225 or 15.227, as appropriate.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2 and 87
of the Commission's Rules to
permit the use of 143.75 MHz
by the Civil Air Patrol.

ORDER

Adopted: September 10, 1991 Released: September 20, 1991

By the Commission:

1. This order amends sections 2.106 and 87.173 of the Rules to reallocate the frequency, 143.75 MHz, for use by the Civil Air Patrol (CAP), a voluntary, civilian auxiliary of the U.S. Air Force. It responds to a request from the National Telecommunication and Information Administration (NTIA) and the United States Air Force (USAF) through the Interdepartment Radio Advisory Committee (IRAC). USAF indicates that the CAP needs additional spectrum to support communications for disaster, emergency, search and rescue (SAR) and training.

2. We find good cause to dispense with the notice and comment provisions of the Administrative Procedure Act (5 U.S.C. Section 553) in making this amendment. This amendment reflects an NTIA request to allocate the frequency 143.75 MHz for use by the CAP. It will not adversely affect existing or future FCC licensees because 143.75 MHz is at present allocated solely for use by agencies of the Federal Government. We would not expect a Notice of Proposed Rule Making (Notice) to generate adverse comments. Further, issuing a Notice would only unnecessarily delay allocating this frequency for CAP use. In short, a public notice and a comment period appears to be unnecessary.

3. Accordingly, IT IS ORDERED, that Sections 2.106 and 87.173 are amended as set forth in the Appendix. Authority for this action is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended. These amendments become EFFECTIVE 30 days after publication of this ORDER in the Federal Register.

4. Point of contact on this matter is Ray LaForge (202) 653-8117.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2--FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation; in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by revising US10 to read as follows:

Section 2.106 Table of Frequency Allocations.

* * * * *

United States (US) Footnotes

* * * * *

US10 The use of the frequencies 26.62, 143.75, 143.90 and 148.15 MHz may be authorized to Civil Air Patrol land stations and Civil Air Patrol mobile stations.

* * * * *

II. Part 87 of Chapter I of of Title 47 of the Code of Federal Regulations is amended as follows:

Part 87--Aviation Services

1. The authority citation in Part 87 continues to read:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.173(b) is amended by adding entry for 143.75 MHz to read as follows:

87.173 Frequencies.

* * * * *

Frequency or frequency band	Subpart	Class of station	Remarks
* * * * *			
143.75 MHz.	R	MA, FAP	Civil Air Patrol

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Robert J. Butler — FOIA Control No. 91-120
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1991 Released: September 17, 1991

By the Commission:

1. The Commission has before it an Application for Review filed by Robert J. Butler on behalf of Aeronautical Radio Inc. (ARINC), appealing a June 26, 1991 Freedom of Information Act (FOIA) decision by the Chief, Common Carrier Bureau (Bureau). The Bureau's decision denied ARINC's request for access to documents that were generated during the course of certain international negotiations held between representatives of American Mobile Satellite Corporation (AMSC), the Union of Soviet Socialist Republics (the Soviet Union), and the United States. AMSC has filed an Opposition to ARINC's Application for Review.[1] As discussed herein, we affirm the Bureau's ruling.

BACKGROUND

2. In 1985, the Commission issued a Notice of Proposed Rule Making to allocate spectrum for a new service known as the mobile satellite service (MSS).[2] Through the notice, the Commission proposed to establish regulatory and technical policies as well as licensing procedures for MSS. The notice explained that a portion of the spectrum to be allocated domestically to the new MSS had been allocated initially to the aeronautical mobile satellite service (AMSS(R)), [3] but the service had never been implemented and the frequencies had remained unused. In July 1986, the Commission allocated spectrum for MSS, including some spectrum to be shared between MSS and AMSS(R).[4] In a subsequent Rule Making order, the Commission concluded that the MSS in the upper L-band for the first generation system would be provided only by a consortium comprised of all willing and qualified applicants.[5]

3. ARINC submitted a license application for an AMSS(R) system in April 1987. Among other things, ARINC proposed that 11 MHz of the spectrum allocated by the FCC for shared use between MSS and AMSS(R) be awarded to a system solely for aviation-related services. The Commission dismissed ARINC's application mainly for failing to conform to the Commission's spectrum allocation decision in the MSS Rule Making orders. Subsequently, in 1989, the Commission awarded the MSS license to a consortium of applicants under the name of American Mobile Satellite Corporation (AMSC).

4. The Commission denied ARINC's petition to reinstate its application, and ARINC then appealed to the United States court of appeals for the District of Columbia Circuit. Other applicants that had been dismissed from the MSS proceeding also appealed, asking the court to review various aspects of the Commission's decisions. In March 1991, the court issued a decision affirming the Commission's dismissal of ARINC's application and the Commission's spectrum allocation decisions.[6] However, the court vacated the Commission's decision to require that MSS be provided only by a consortium. The court remanded this aspect of the Commission's MSS proceeding to the Commission, holding, among other things, that the Commission had not provided adequate justification for its decision to adopt a consortium-licensing approach in lieu of comparative hearings among competing MSS applicants.

5. On May 10 through 15, 1991, prior to the issuance of the court's mandate, representatives of AMSC, the Soviet Union, and the Commission attended meetings, which had taken over one-and-a-half years to arrange, to discuss the international coordination of the United States MSS system. The meetings were held pursuant to an international process that is designed to ensure cooperative use of spectrum for geostationary satellites by different countries who are members of the International Telecommunication Union (ITU).[7] Under ITU regulations, an administration seeking to use a frequency provides information about its proposed satellite system to the International Frequency Registration Board (IFRB), which in turn publishes information on the proposed system to all ITU members. The administration proposing the system must then coordinate with all other ITU administrations whose systems might be affected by the proposal. The crux of the coordination process is the exchange of detailed technical data between administrations in an effort to negotiate an agreement that will provide for the coexistence and effective operations of proposed or existing systems by avoiding any mutual harmful interference. The Commission conducts this international coordination process on behalf of the United States and includes as advisors in the coordination process representatives of the domestic entities proposing commercial satellite communications systems.

6. On July 30, 1991, the Commission adopted a *Tentative Decision* in response to the court's remand and concluded that compelling factors unique to the MSS proceeding required that a consortium approach be adopted.[8] Specifically, the Commission explained that selection of an MSS licensee through a comparative hearing would likely prevent the United States from successfully completing the international frequency coordination of a domestic MSS system. The Commission also granted AMSC a temporary authorization to allow the international coordination of the United States MSS system to continue pending issuance of a final decision.

7. On June 11, 1991, ARINC filed a FOIA request seeking access to numerous documents generated during the United States coordination meetings held with the Soviet Union during May 10 through May 15, 1991. In particular, ARINC requested: minutes and other documents showing matters discussed during the meetings, memoranda and other documents describing or summarizing the meetings, and any agreements or understandings produced as a result of the meetings. The

Bureau identified 26 documents that fell within the scope of ARINC's request, but withheld twenty-four of these documents in full or in part.[9]

8. The Bureau found that some of the documents contained information reflecting the process by which the Commission developed the United States' negotiating position for satellite coordination with the Soviets. Access to these documents was denied pursuant to the deliberative process privilege embodied in Exemption 5 of the FOIA.[10] The Bureau also found that other documents contained commercial information exchanged among the parties to the coordination meetings. These documents were withheld pursuant to FOIA Exemption 4.[11]

9. On review, ARINC does not dispute the Bureau's specific findings that the identified documents meet the threshold requirements of Exemptions 4 or 5. With respect to the documents withheld pursuant to Exemption 4, ARINC argues simply that there are public interest and due process reasons for releasing the documents. ARINC therefore maintains that, under the FOIA, Exemption 4 may not be invoked to shield the documents from disclosure. With respect to the documents withheld under Exemption 5, ARINC asserts that the Commission waived the protection afforded by this exemption when it disclosed the documents to AMSC, an outside party.

10. In reviewing the Bureau's decision, we shall examine first whether the Bureau properly invoked the FOIA exemptions. Then, if the FOIA does not require disclosure, we shall next consider whether there is a public interest basis for requiring the documents' disclosure as a matter of our discretion.

DISCUSSION

I. FOIA ISSUES

A. Exemption 4 Records

11. Turning to the applicability of Exemption 4, we note that this exemption protects commercial or financial information obtained from a person when the information at issue is privileged or confidential. 5 U.S.C. § 552(b)(4). Within that context, information is "obtained from a person" if it has been generated by an entity that is outside the government, including foreign countries. *See Stone v. Export-Import Bank of United States*, 552 F.2d 132 (5th Cir. 1977). The "privileged or confidential" test is met if disclosure is likely to: 1) impair the Government's ability to obtain the necessary information in the future (the "impairment prong"); 2) cause substantial harm to the competitive position of the person from whom the information was obtained (the "competitive harm prong"); or 3) adversely affect the effectiveness of the Government's programs (the "program effectiveness prong"). *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *see also Critical Mass Energy Project v. Nuclear Regulatory Commission*, 931 F.2d 939, 943 (D.C. Cir. 1991); *9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 10 (1st Cir. 1983).

12. We first address the Bureau's conclusion that documents 1 through 20 and document 24, listed in the attached "*Vaughn*" index,[12] are protected from mandatory disclosure under Exemption 4. An examination of documents 1 through 20 and document 24 reveals that they contain technical information and agreements about satellite systems obtained from either AMSC or the Soviet Union. Applicable case law has established that records are "commercial" as long as the submitter has a commercial interest in them. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *American Airlines Inc. v. National Mediation Board*, 588 F.2d 863, 868 (2d Cir. 1978). The technical information submitted during the coordination meetings by AMSC and the Soviet Union regarding their commercial satellite systems clearly fits this standard. The documents thus satisfy the first two requirements of Exemption 4, in that they comprise commercial information obtained from persons outside the government.

13. The remaining question is whether the Bureau properly determined that the documents were privileged or confidential. In deciding that the documents referenced above contained confidential information, the Bureau relied on the program effectiveness prong of Exemption 4. We agree with this determination. As explained by the Bureau, these documents reflect specific technical information exchanged by the parties to the coordination meetings (*e.g.* documents 1, 2, 3, 5, and 6 through 16), matters discussed among the parties (*e.g.* document 4, documents 17 through 20, document 24), and agreements reached (*e.g.* documents 17 through 20, document 24) during the coordination meetings.[13] The information exchanged goes beyond what is required to be disclosed publicly by international treaties, which require only the publication of information regarding the outermost parameters of an administration's plan for spectrum use. In particular, the information exchanged contains individualized concessions designed to facilitate the cooperative use of the spectrum. Public disclosure of this information would reveal the United States' negotiating strategy with the Soviet Union and the types of concessions that the United States was willing to consider in these particular negotiations. Its disclosure would thus hamper the United States' ability to engage in successful MSS negotiations with the other entities and countries proposing MSS systems, for which the United States might develop a different negotiation strategy. As a result, disclosure would undermine the United States' ability to obtain the optimum amount of spectrum to support a domestic system and, eventually, to conclude agreements with the other administrations and international organizations.[14]

14. Moreover, as noted by the Bureau, foreign administrations expect that coordination meetings be conducted in private and that the agreements reached will be held in confidence. Thus, release of the information contained in these documents could undermine the United States' ability to negotiate successfully in future coordinations. Other countries will not be willing to make the types of technical and other concessions reflected in the documents at issue if the information were freely available to other nations with whom negotiations are also being carried out. As a consequence, and to the detriment of the U.S. public, the United States, unlike other nations, will be unable to negotiate for spectrum usage under the favorable terms and conditions that may be made available to the other nations that engage in this process. For these reasons, we believe that the Bureau properly concluded that disclosure of these documents would adversely affect the United States' interest in conducting effective negotiations for the international coordination of satellite services.[15]

15. Further, we find that portions of documents 1, 2, 3, and 5 are protected from mandatory disclosure also under the competitive harm prong of Exemption 4. The competitive harm prong of Exemption 4 requires a showing that actual competition exists and substantial competitive injury would likely result from disclosure. *See National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). Applying these precepts to this case, we note that AMSC will face business competition from other entities that provide, or seek to provide, mobile services. These documents contain selective technical data and information that AMSC was willing to share only with the Soviet Union representatives in coordinating use of this spectrum. Disclosure of these documents will limit the United States' ability to adopt a different negotiating posture in the coordination of MSS with other countries proposing MSS systems, thereby adversely affecting its ability to obtain the optimum amount of spectrum for AMSC to successfully conduct business. We conclude, therefore, that disclosure of this information will likely result in substantial competitive harm to AMSC. Similarly, to the extent that the minutes of the meetings (documents 17 through 20) would reveal the information contained in documents 1 2, 3, and 5, the minutes are also protected pursuant to the competitive harm prong of Exemption 4.[16]

16. We also find that the impairment prong of Exemption 4 affords additional protection to documents 6 through 12. The impairment prong of Exemption 4 applies when documents were voluntarily submitted to the agency and disclosure would significantly impair the Government's ability to obtain the same type of information in the future. *See Landfair v. Department of the Army*, 645 F. Supp. 325, 328 (D.D.C. 1986); *Carlisle Tire & Rubber Co. v. Customs Serv.*, 1 GDS ¶ 79.162 (D.D.C. 1979), *aff'd in part, rev'd in part on other grounds*, 663 F.2d 210 (D.C. Cir. 1980). Documents 6 through 12 are advance copies of Soviet Union records containing the boundary parameters of satellite systems proposed by the Soviet Union. While the final versions of these records must be submitted to the ITU for publication, the Soviet Union representatives were under no legal obligation to share these records in advance. Instead, these records were voluntarily submitted to facilitate the coordination of the U.S. MSS satellite system. If the documents were disclosed publicly, we believe there is far less likelihood that the United States would be afforded the privilege of early, and exclusive, access to such information in the future. We conclude, therefore, that disclosure of documents 6 through 12 would impair the Commission's ability to obtain this type of information from foreign administrations in the future.

17. Finally, as noted above, nowhere in its application for review does ARINC challenge, respond to, or in any way dispute the Bureau's findings that disclosure of this information would have a very serious adverse impact on the United States' ability to engage in international satellite coordination. ARINC simply contends that because disclosure is required to satisfy the Commissions' *ex parte* rules or due process concerns, the information cannot be considered "confidential" under Exemption 4. However, as AMSC points out in its Opposition, the applicability of the FOIA exemptions is not dependent on the particular circumstances of a FOIA requester or its litigation or other needs. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 109 S. Ct. 1468, 1480 (1989); *North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989). Therefore, the issues raised by ARINC in support of disclosure do not affect the applicability of Exemption 4 to the documents in question. The *ex parte* and public interest issues raised by ARINC thus will be treated separately below in considering whether to disclose the documents withheld, not pursuant to the mandates of the FOIA, but as a matter of our discretion.

B. Exemption 5 Records

18. We now address the Bureau's determination to invoke the deliberative process privilege embodied in Exemption 5 as grounds for withholding information contained in some of the documents at issue. In particular, the information withheld under the deliberative process privilege consists of three drafts of minutes for the coordination meetings (documents 17, 18, and 19), handwritten notations by Commission staff members in documents 2, 18, and 19, and an internal memorandum concerning the meetings prepared by a Commission staff member and addressed to staff members of the FCC, and two other federal government agencies (document 24).

19. The deliberative process privilege protects intra-agency or inter-agency memoranda that are predecisional--formulated before the adoption of an agency decision--and deliberative -- reflecting the "give and take" of the consultative process leading to the adoption of a final agency decision. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). The privilege seeks to protect the frank consideration of alternatives within the agency, and preserve the integrity of the agency's decisionmaking process. Applying these principles in this case, we first note that the drafts of the minutes for the coordination meetings were authored by the representatives of the negotiating parties during the course of the coordination meetings. Because the meetings included representatives from a foreign government, we cannot find that these documents were created within or among U.S. government agencies. Therefore, the draft minutes do not meet the threshold requirement for protection under Exemption 5. These minutes, however, do remain protected from disclosure under Exemption 4. *See* paras. 13-15, *supra*.

20. With respect to the memorandum identified as document 24 and the handwritten notations in documents 2, 18, and 19, we find that the Bureau properly invoked the deliberative process privilege as grounds for withholding these records. As a threshold matter, we note that these records were created by Commission officials representing the United States during the coordination meetings. The information contained in the memorandum and in the notations is clearly predecisional because it was generated for the purpose of developing specific agreements for the coordination of the AMSC satellite system. Further, the deliberative nature of the information is also apparent because it reflects the staff's assessment of different coordination matters discussed during the negotiation meetings. Therefore, we agree with the Bureau's conclusion that this information falls within the scope of Exemption 5.

21. ARINC states, however, that the Commission representatives disclosed the records at issue to AMSC, a non-Government entity. Thus, ARINC argues that disclosure to AMSC vitiated the protection otherwise afforded by

Exemption 5. AMSC, on the other hand, maintains that, in the circumstances presented in this case, any disclosure to AMSC would not result in a waiver of Exemption 5.

22. We have examined the manner in which the information at issue was created and used. The authors of these particular records state that they did not disclose the records to AMSC or to the Soviet Union representatives. The authors explain that, while the matters addressed in the records were subjects of discussions during the meetings, the records themselves were not shared with the other parties to the negotiations. In these circumstances, we cannot conclude that the protection afforded by Exemption 5 has been waived. *See Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba*, 624 F. Supp. 572, 577-78 (D.D.C. 1984).[17]

23. Moreover, we would reach the same determination even if, as ARINC suggests, the information at issue had been disclosed to AMSC. In considering a question of waiver, the courts have upheld the agency's claim of exemption where the agency has established that it has acted responsibly in furtherance of a legitimate governmental purpose. For example, in *Badhwar v. Department of the Air Force*,[18] the agency released to outside contractors information that was later incorporated in certain safety reports prepared by the agency. The court found that such disclosure was for the limited purpose of securing the contractors' advice in the process of assembling a governmental report. Under those circumstances, it concluded that the agency had established a legitimate governmental purpose and therefore had not waived the protection afforded by the deliberative process privilege. Similarly, in *Aviation Consumer Action Project*,[19] the court afforded Exemption 5 protection to documents prepared by the agency and released to nongovernmental officials who were members of an advisory committee to the agency.

24. The instant case presents similar considerations. As we explained in our *Tentative Decision*, AMSC is not an ordinary private party. Rather, AMSC was an essential participant in the coordination process. AMSC acted in an advisory capacity to the Commission in identifying technical, economic, and spectrum tradeoffs during the negotiations. In addition, AMSC's presence provided assurance to other administrations that the coordination agreement will be adhered to and that the requirements specified by the Commission are necessary and will be implemented. *See Tentative Decision*, at para. 42. Any disclosure to AMSC during the coordination meetings would have been made for the purpose of assisting the Commission in the coordination process. In these circumstances, we believe that a legitimate government purpose for the disclosure would have been established, and thus a waiver claim would not have been sustained.[20]

II. EX PARTE AND DUE PROCESS ISSUES

25. Having determined that the documents at issue are not required to be disclosed under the FOIA, we next address ARINC's claims that the documents submitted by AMSC and the Soviet Union must be disclosed because they are prohibited *ex parte* communications and because they concern critical issues in the MSS licensing proceeding. As discussed below, information and documents submitted for purposes of carrying out the international coordination process do not violate the *ex parte* rules. Further, access to this material is not required in order to ensure due process in the licensing proceeding.

26. Where mutually-exclusive applications are pending or where a petition to deny has been filed against a radio application, the proceeding is "restricted" under the Commission's *ex parte* rules. In a restricted proceeding, no *ex parte* "presentations" may be made until a Commission decision is no longer subject to reconsideration or to review by any court. *See* 47 C.F.R. § 1.1208. Because the MSS licensing proceeding involves mutually exclusive applications and petitions to deny were filed against AMSC's MSS application, the licensing proceeding is restricted.[21]

27. The *ex parte* rules do not prohibit the communications in question for several reasons. The rules prohibit *ex parte* "presentations," which are defined as communications "directed to the merits or outcome of a proceeding." 47 C.F.R. § 1.1202(a). The communications in question, however, are not directed to, nor do they concern, the merits or outcome of a proceeding to select an MSS licensee. As discussed below, para. 34, the communications at issue largely concern specific power levels, bandwidth and frequency usage, and are directed solely to the negotiations for, and outcome of, the specific international coordination process carried out with the Soviet Union. The international coordination process, moreover, is not a restricted proceeding under the Commission's *ex parte* rules. Indeed, as explained above, to ensure that the United States and other countries' interests are protected, the negotiations are not conducted as public proceedings but are carried out in confidence. Because, therefore, the communications are directed only to the outcome and conduct to an international negotiation, and are not directed to selection of an MSS licensee in a restricted FCC licensing proceeding, they are not prohibited *ex parte* presentations.[22]

28. Further, even if the communications at issue were considered to be directed to the merits or outcome of the licensing proceeding, they would be permissible for other reasons. The *ex parte* rules do not prohibit presentations that are "authorized by the Commission's Rules" or which "involve a . . . foreign affairs function of the United States . . . ." 47 C.F.R. §§ 1.1204(b)(1); (b)(4). Under authority of section 25.202(c) of the rules, the Commission directed AMSC to submit the information in question and held it in confidence to enable the effective conduct of the negotiations. Contrary to ARINC's claims, AMSC thus has not "used the pendency of coordination as a pretext for unlawful *ex parte* communications." AMSC merely complied with the Commission's lawful requests to provide the specific information necessary for the conduct of the Soviet negotiations.[23]

29. Finally, the Commission's *ex parte* rules contain an explicit exception for presentations that involve a "foreign affairs function of the United States." 47 C.F.R. § 1.1204(b)(4). In adopting this exception, the Commission envisioned that it would be used on occasions in which the Commission has "negotiations with counterparts from foreign countries and in which disclosure of the meetings or their substance could have injurious repercussions on this country's relations with other nations." *Report and Order*, 2 FCC Rcd. 3011, 3018, para. 51 (1987). This reasoning applies squarely to the information provided by the Soviet Union during these negotiations, as well as to the documents and minutes that reflect agreements between the United States and the Soviets. In adopting the exception, we noted that "absent highly unusual circumstances," the foreign affairs exemption will apply only to *ex parte* communications with Federal Government of-

ficials or with officials from other countries. *Report and Order*, 2 FCC Rcd 3011, 3018, para. 52 (1987). As to information supplied by the Soviet Union, we believe any communication concerning such Soviet-supplied information is within the foreign affairs exception, whether the Soviets provide the information to FCC officials directly or the same Soviet-provided information is contained in documents prepared by AMSC.

30. As to other communications made by AMSC, which may not contain Soviet-supplied information, we conclude the international coordination process is an "unusual" circumstance contemplated by the rule, in which these communications are permissible even though provided by a non-Government entity. We explained in our *Tentative Decision* in the MSS proceeding that the presence and full participation of a U.S. licensee is a necessary adjunct to the satellite coordination process. Thus, AMSC must supply information and participate in consultations critical to development of the U.S. negotiating position. In addition, public disclosure of information supplied by AMSC would jeopardize United States interests in successfully negotiating either with the Soviet Union or with other countries with whom coordination also must be carried out. In these circumstances, the policy and purposes underlying the foreign affairs exception apply as strongly to communications from AMSC as to communications we might receive from Federal Government officials. We conclude, therefore, that the communications at issue were not improper under the Commission's *ex parte* rules. They were not directed to the merits of any restricted FCC proceeding, and, in any event, they were authorized by FCC rules and are within the foreign affairs exception to the *ex parte* restrictions.

31. In concluding that the communications are excepted from the *ex parte* prohibition, we strongly emphasize that the foreign affairs exception is not intended as a mechanism for the submission of communications that are intended to influence decisionmakers in restricted matters. The communications at issue were strictly confined to matters necessary to the conduct of the international negotiations. We therefore conclude that application of the foreign affairs exception in this instance is proper.

32. As a final matter, we address ARINC's related claim that the documents should be disclosed as a matter of fundamental fairness and due process, because the information concerns "critical issues" in the MSS licensing proceeding. The Commission, pursuant to section 0.457(d)(2)(i) of the rules, may disclose material that is within Exemption 4 upon a "persuasive showing." Pursuant to this rule, the Commission's long standing policy is that Exemption 4 materials will not be made available on the mere chance that the information might be interesting or helpful in an FCC proceeding. Rather, the Commission insists on a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. *Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4487 (1987); *Knoxville Broadcasting Corporation*, 87 FCC 2d 1099, 1105 (1981); *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978).

33. ARINC asserts that details of the AMSC and Soviet satellite systems go to the merits of an MSS licensing proceeding that will determine "the technologically best qualified" MSS applicant. At this juncture, however, the Commission has reached a tentative decision that no comparative licensing proceeding will be conducted to select among the MSS applicants. *See Tentative Decision* at paras. 48-53. Therefore, even assuming that the information at issue is relevant to the relative technical qualifications of an MSS applicant, and, moreover, that an issue as framed by ARINC were to be designated for hearing, the proceeding envisioned by ARINC has not yet been designated by the Commission and there is no certainty that it will be.

34. In addition, the information at issue (and especially the information supplied by the Soviets) does not bear on the "technological superiority" of any applicant. Information concerning the technical merits of AMSC's application is fully available from AMSC's publicly filed application and amendments to that application. To the extent AMSC intends to make any major or minor modifications to its application, those changes, too, must be placed in the public record.[24] The information withheld, in contrast, either is unrelated to the technical aspects of AMSC's system or reflects particular accommodations, in terms of power levels, bandwidth and specific frequency usage, that AMSC could make to enable coordination with the Soviets. To a large degree, these technical parameters may be based on particular customer requirements, reflect business judgments made by the licensee, or were tailored to a specific negotiating strategy for the particular foreign country and system involved. *See Tentative Decision* at para. 42. The information thus concerns highly individualized business, technical, and negotiating judgments that might be made by any licensee authorized to operate in this spectrum and who undergoes coordination. It does not reflect on the technical "superiority" of the system.

35. Indeed, as a practical matter, it is difficult to envision how the detailed technical decisions pertaining to an actual coordination could be at issue in an initial licensing proceeding. Decisions concerning coordination necessarily are dependent on the proposed plans of other countries and concessions that may be made by them in the actual negotiating process. Thus, as the Commission recognized when it issued AMSC's original authorization, its MSS licensing decision could not be based on matters that might transpire during the "dynamic" process of actual negotiations.[25] We conclude, therefore, that ARINC has not made a persuasive showing that the information at issue is necessary to the resolution of any issues of "technical superiority," or any other issues, that might be addressed in any currently pending licensing proceeding. *See Pan American Satellite*, 4 FCC Rcd 4586, 4587 (1989); *Western Union Telegraph Co.*, 2 FCC Rcd at 4487.

36. ARINC also states that the information under consideration relates to the "critical issues" of "ability to coordinate with international satellites and ability to operate on a non-interference basis." Application for Review at 16. The issue of the United States' ability to coordinate an MSS satellite system was considered at an earlier phase of the MSS proceedings as an aspect of the Commission's general Rule Making decision to allocate the particular spectrum that was chosen for MSS. However, in its decision upholding the Commission's spectrum allocation rule, the court of appeals already has affirmed the Commission's Rule Making decision concerning the MSS spectrum allocation in the face of ARINC's claim that coordination of the AMSC system is not feasible. The court recognized the "simple reality that no final judgment [regarding the prospects for international coordination] is possible absent completion of the coordination

process, *i.e.*, after interaction between actual licensees with concrete system proposals." 928 F.2d at 444. The court also deferred to the Commission's "predictive judgment" that its allocation scheme will prove compatible with international obligations. The court noted only that, should the Commission's predictions about the effectiveness of international coordination prove erroneous, "the Commisson will need to consider its allocation in accordance with its continuing obligation to practice reasoned decisionmaking." *Id.* at 445.

37. In evaluating the success of MSS coordination, the Commission fully intends to engage in reasoned decisionmaking. As the court of appeals recognized, however, the international coordination process is still unfolding. Therefore, it is premature now to attempt to make any final assessment regarding the success of the coordination process. *See Tentative Decision* at paras. 47, 53. Moreover, the United States participants in those negotiations --the FCC, AMSC, and other Federal Government entities, including the National Telecommunications and Information Administration (representing the Federal Aviation Administration's interests)-- have every incentive to ensure that negotiations are conducted in a manner that best serves U.S. needs and the public interest. Public disclosure of the documents at issue would only jeopardize the negotiations' successful completion. We further note that the international negotiating process is not required to be conducted as a public Rule Making proceeding.[26] In these circumstances, we conclude that ARINC has advanced no persuasive reason to require disclosure of these documents, and they will not be released pursuant to section 0.457(d)(2)(i) of the rules.

CONCLUSION

38. In view of the foregoing, the Application for Review filed by Robert J. Butler on behalf of Aeronautical Radio Inc. IS DENIED. Mr. Butler may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

39. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie R. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On August 19, 1991, ARINC filed a "Motion to Strike or, in the Alternative, to Accept Reply." Due to the importance of the issues under consideration in this FOIA proceeding, we shall deny ARINC's motion to strike and accept ARINC's Reply.

[2] *Rules to Allocate Spectrum for, To Establish Rules and Policies Pertaining to the Use of Radio Frequencies in Land Mobile Satellite Service for Various Common Carrier Services*, 50 Fed. Reg. 8149 (1985) ("NPRM"). MSS is a radio communications service that uses satellites to relay radio signals to and from mobile units.

[3] The AMSS(R) is reserved for aeronautical mobile satellite communications relating to the safety and regularity of flight, primarily along national and international air routes.

[4] *Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, 2 FCC Rcd. 1825 (1986) ("Allocation Order").

[5] *Second Report and Order*, 2 FCC Rcd. 485, 486 (1987).

[6] *Aeronautical Radio Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991). ARINC filed a petition for rehearing, which was denied by order dated May 30, 1991.

[7] The ITU is a multi-national public organization formed to facilitate international cooperation in the use and development of telecommunications services. The ITU charter, known as the International Telecommunication Convention, was ratified by the United States in 1985. The charter grants the ITU authority to coordinate the efforts of ITU members in the use of communications systems so as to eliminate harmful interference between radio communications systems of different countries. In view of the importance of these meetings to U.S. interests, and the problems that had been encountered in arranging them, the Commission determined that the meetings should go forward with the then-U.S. MSS licensee. No MSS coordination meetings were conducted during the period after issuance of the court's mandate and prior to the Commission's *Tentative Decision*, discussed below, awarding AMSC a temporary authorization.

[8] *Tentative Decision*, FCC 91-240, Mimeo No. 38225, released August 2, 1991. The deadline for filing comments to the Commission's tentative decision is September 4, 1991; reply comments must be filed by September 23, 1991.

[9] The Bureau attached two lists of documents to its initial decision. Attachment A, captioned "Materials Available for Inspection," listed four documents. Most of the information contained in those documents was released. Attachment B, captioned "Materials not Available for Inspection," listed 24 documents. Documents 3 and 4 in Attachment A were also listed in Attachment B as documents 20 and 24, respectively.

[10] Exemption 5 of the FOIA prevents the disclosure of "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been extended to incorporate certain common law privileges developed in civil discovery cases, including, among others, the deliberative process privilege. *See Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

[11] Exemption 4 is designed to protect "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4).

[12] For purposes of clarity, we have listed and described the documents under consideration in the same order and manner as set forth in Attachment B to the Bureau's decision. *See* note 9, *supra*.

[13] By letter dated September 5, 1991, AMSC withdrew its request for confidentiality for portions of document 3. We agree that parts of this document should not be withheld pursuant to Exemption 4, and those parts will be made available for inspection.

[14] The United States is holding other bilateral MSS negotiations with Canada, INMARSAT, and Mexico. It will begin negotiations with Australia and with Papua New Guinea in the near future.

[15] The Bureau found that documents 21, 22, and 23 were handwritten personal notes reflecting coordination matters discussed at the meetings. The Bureau explained that the notes, prepared by Commission staff members who attended the meetings, were only for the authors' individual use. Thus, the Bureau concluded that these documents were not agency records subject to the FOIA. The Bureau further concluded that, even if these documents were considered agency records, they would be protected from disclosure under the program effectiveness prong of Exemption 4. (The Bureau also determined that the documents would be protected under Exemption 5. *See* note 16, *infra*.) ARINC does not challenge the Bureau's conclusions. Nonetheless, we have examined the documents at issue. We agree with the Bureau's determination that these documents are personal notes not subject to the FOIA. Moreover, for the reasons discussed above in paragraphs 13 and 14, we agree that even if these documents were considered agency records, they would be protected under the program effectiveness prong of Exemption 4.

[16] We do not reach here whether the competitive harm prong of Exemption 4 provides additional justification for withholding information pertaining to AMSC's business plans also contained in documents 1 through 5 and 17 through 20. However, we reserve the option of examining these documents under this standard if further litigation ensues in this FOIA proceeding.

[17] As noted before, the Bureau concluded that documents 21, 22, and 23 were not agency records subject to the FOIA, and that even if considered agency records, these documents would be protected under the deliberative process privilege embodied in Exemption 5. (The Bureau also found that the documents would be protected under Exemption 4.) *See* note 14, *supra*. In this connection, the Bureau explained that these documents contained information reflecting the Commission's internal deliberations regarding the coordination process. ARINC does not challenge the Bureau's conclusions, but asserts that disclosure of these documents is not required if they have not been shared with AMSC and if summaries of the notes have been placed in the public file. We have examined these documents and agree with the Bureau's determination. As the Bureau's decision clearly stated, the documents were not circulated to or used by anyone other than the authors. Thus, the notes are personal records that are not subject to the FOIA provisions. Further, we agree that even if considered agency records, the documents would be protected by Exemption 5. In this connection, we further conclude that, because the documents were not shared with AMSC or the Soviet Union, no question of waiver arises with respect to their protected status under the FOIA.

[18] 629 F. Supp. 478 (D.D.C. 1986).

[19] 535 F.2d 101 (D.C. Cir. 1976).

[20] In contrast, the cases cited by ARINC are clear examples of instances in which the courts have found no legitimate government purpose justifying the disclosure. Instead, the courts sought to redress the unfairness created by the agency's preferential treatment for certain parties involved in litigation against the agency. Thus, in *Cooper v. Department of Navy*, the court faulted the agency for not adhering to its own regulations for the dissemination of information when it made the information available to persons who were not authorized access under the regulations. 594 F.2d 484 (5th Cir. 1979). In *North Dakota ex rel. Olson v. Andrus*, the court held that the agency arbitrarily and for no compelling reason had disclosed the documents at issue to a private party. 581 F.2d 177 (8th Cir. 1978).

[21] It should be pointed out that the MSS Rule Making proceedings to establish the MSS allocation and licensing rules are not restricted proceedings. Rather, those Rule Making proceedings are "non-restricted" proceedings, subject to the Commission's more relaxed "permit but disclose" *ex parte* rules. *See NPRM*, 50 Fed. Reg. 8149 (1985); 47 C.F.R. § 1.1206. We also note that the MSS licensing proceeding did not become restricted as a consequence of the court of appeal's opinion addressing various aspects of the Commission's MSS decisions. The proceeding was restricted even prior to the decision of the court of appeals.

[22] We note that the FCC's Deputy General Counsel, in responding to a letter from ARINC prior to the Soviet negotiations, similarly advised ARINC that communications that occur during the negotiations "are not directed to the merits or outcome of any restricted FCC proceeding." Letter from Renee Licht, Deputy General Counsel, to Andrew T. Hospoder, Chairman and CEO of Aeronautical Radio, Inc. (May 3, 1991). ARINC did not seek review of that ruling.

[23] Section 25.202(c) provides that applicants, permittees and licensees of satellite radio stations "shall provide the Commission with all information it requires for the...coordination...of frequency assignments pursuant to the international Radio Regulations...."

[24] As indicated above, note 13, we have determined that portions of one of the documents at issue contain certain general descriptions of AMSC's satellite system that are not within Exemption 4, and this information will be released. The information released largely duplicates information that is already in the public record.

[25] Specifically, in responding to arguments that AMSC had provided "insufficient technical analysis" to demonstrate that coordination can be successfully accomplished, the Commission emphasized that it would not in the licensing proceeding "prejudge the outcome of this dynamic [coordination] process. Numerous techniques and options are available for avoiding interference between satellite networks, and we expect that these will be explored in coordinating the AMSC network with other AMSS (R) and MSS networks." *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6041, 6056, para. 106 (1989). The Commission further noted that, after the issuance of AMSC's authorization, it would require AMSC to provide "the Commission" all information necessary to coordination. *Id*. The parties to the AMSC licensing proceeding thus had no reasonable expectation that information submitted to the Commission for purposes of the coordination process, which customarily, and of necessity, is kept confidential, would be entered on the public record and addressed as part of any initial licensing proceeding. Of course, to the extent the negotiations lead to any major or minor modifications to AMSC's application, those matters will be addressed on the public record.

[26] *See* 5 U.S.C. § 553(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND SECOND SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

Adopted: August 1, 1991; Released: September 4, 1991

Comment Date: October 21, 1991
Reply Comment Date: November 20, 1991

By the Commission:

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I. INTRODUCTION

1. This Memorandum Opinion and Order on Reconsideration modifies the Report and Order (the "Order") addressing the obligations of local exchange carriers (LECs) in furnishing 800 access service to interexchange carriers (IXCs) [1] by: (a) adopting a revised access time standard for the implementation of mandatory data base access [2] and requiring the seven Bell Operating Companies (BOCs) and GTE to meet that standard within eighteen months from the date of release of this Order; and (b) eliminating the requirement that IXCs provide LECs with the POTS number of each 800 service subscriber that uses a LEC for its intraLATA 800 service. [3] In addition, we clarify the Order in certain respects. We otherwise deny the petitions for reconsideration.

II. BACKGROUND

2. 800 service is an interexchange service in which subscribers agree in advance to pay for all calls made to them using a predesignated 800 number. LECs must handle originating 800 access differently from originating access for ordinary interexchange calls because the LECs must route 800 calls to the carrier selected by the 800 service subscriber (the called party), rather than the carrier presubscribed to the originating line or chosen by the calling party.

3. LECs currently provide originating 800 access service through the so-called "NXX" screening methodology. Under this system, LECs identify the interexchange carrier by reading the three digits (the NXX digits) that immediately follow the 800 prefix of the dialed number. Because the NXX system identifies the 800 carrier by the NXX digits, this system requires that each NXX be as-

[1] Provision of Access for 800 Service, 4 FCC Rcd 2824 (1989).
[2] "Mandatory" data base access will occur when NXX access is discontinued. At that time, IXCs that wish to offer 800 service will be required to use 800 data base access.
[3] POTS is an acronym that stands for "plain old telephone service." A POTS number is the ten-digit North American Numbering Plan phone number (3-digit area code plus 7-digit phone number). Because 800 numbers differ from the telephone numbers that are used for local exchange and ordinary long distance service,800 numbers generally must be translated into POTS numbers before 800 calls can be transmitted over the public switched network.

signed to a particular carrier. Consequently, under the NXX system, 800 subscribers cannot change carriers without changing their 800 number. In addition, subscribers that seek a particular 800 number must obtain their 800 service from the carrier to which the NXX digits in that number have been assigned. Under the NXX system, access time is either 1.9 or 3.5 seconds, depending on whether the originating 800 traffic comes to the IXC from an end office or an access tandem. [4]

4. The BOCs, along with some Independent Telephone Companies (ITCs), have proposed to replace the NXX access system with a new "data base" system of 800 access. LECs would implement this data base system by linking their common channel signaling system (SS7) networks with data bases containing service information associated with each 800 number, including the carrier selected by the 800 subscriber with that number. Because the data base system permits LECs to use the entire 800 number, rather than just the NXX digits, to identify the 800 carrier, this system provides for 800 "number portability" --*i.e.*, it permits an 800 subscriber to use any carrier (or more than one carrier) with any 800 number, and to change carriers without changing its 800 number.

5. The LECs can also use this data base system to provide various "vertical" features. These include: (1) call validation (ensuring that calls originate from subscribed service areas); (2) POTS translation of 800 numbers (which is generally necessary for the routing of 800 calls); (3) alternate POTS translation (which allows subscribers to vary the routing of 800 calls based on factors such as time of day, place of origination of the call, etc.); and (4) multiple carrier routing (which allows subscribers to route to different carriers based on similar factors). [5]

6. On July 12, 1985, Bell Atlantic filed a petition for rulemaking on the provision of 800 access by the LECs. In January, 1986, the Commission initiated this proceeding by issuing a Notice of Proposed Rulemaking to address the obligations of LECs with respect to 800 access service, including whether a mandatory schedule for implementation of the data base system should be established. [6] On April 21, 1989, the Commission released the Order. We have received fifteen petitions for partial reconsideration and/or clarification of the Order. [7]

III. IMPLEMENTATION OF MANDATORY DATA BASE ACCESS

A. The 1989 Order

7. The Order found that the data base system of 800 access would offer both advantages and disadvantages vis-a-vis NXX access. Specifically, the Order found that while "the number portability made possible by the data base plan would allow 800 subscribers greater flexibility in choosing 800 numbers and carriers and also help promote competition in the 800 market[,]" the data base plan would significantly increase access time for 800 calls -- initially by 5.5 or 7.1 seconds over current NXX levels, then by 1.5 or 3.1 seconds when LECs used SS7 to interconnect with IXCs from LEC access tandems. The Order found that these increases would be entirely eliminated only when LECs deployed SS7 at their end offices. [8]

8. Based on these competing considerations, the Commission concluded that, for the time-being, it should not compel implementation of 800 data base access or permit LECs to discontinue NXX access.[9] The Order stated:

> If and when the LECs' deployment of [SS7] is sufficient so that the level of access delay associated with the data base system is substantially reduced, we will, upon appropriate petition, permit LECs to discontinue NXX access. Our current expectation is that we will be able to grant such a petition when [SS7] is deployed to access tandems and, on a nationwide average basis, to end offices accounting for eighty percent of originating 800 traffic. [10]

B. Positions of the Parties

9. Nine LECs, [11] USTA, and US Sprint petitioned for reconsideration of the Commission's "expectation" that LECs would be permitted to withdraw NXX access only after SS7 had been implemented in end offices accounting for eighty percent of the nation's originating 800 traffic. They argued that this standard would not permit number portability until the mid-to-late 1990s and that the Order places too much emphasis on access time vis-a-vis number portability. Most of these parties argued in their petitions that LECs should be permitted to withdraw NXX access when SS7 interconnection with IXCs is available at all LEC access tandems handling 800 traffic. [12] Most said that this could be accomplished by the end of 1991 and that access times would then be 1.5 or 3.1 seconds greater than under NXX access.

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[4] We use the term "access time" to describe the time beginning when the caller completes dialing an 800 call and ending when the call is delivered by the originating LEC to an IXC.

[5] For additional background information, see 4 FCC Rcd at 2825. *See also* Supplemental Notice of Proposed Rulemaking, 3 FCC Rcd 721,721-22 (1987); and Notice of Proposed Rulemaking 102 FCC 2d 1387, 1388-92 (1986).

[6] *See* Provision of Access for 800 Service, Notice of Proposed Rulemaking,102 FCC 2d 1387, 1393-94 (1986). In 1987, the Commission issued a Supplemental Notice of Proposed Rulemaking. *See* note 5 *supra*.

[7] A list of parties filing petitions for reconsideration, comments, and replies is attached as Appendix A. We use the abbreviations listed in that appendix throughout this order.

[8] 4 FCC Rcd at 2826-27, 2829, paras. 20, 38.

[9] Although the Commission's 1989 Order declined to adopt a mandatory 800 data base access plan, both our original 1986 Notice of Proposed Rulemaking in this proceeding and our subsequent 1988 Supplemental Notice sought comment on whether a mandatory 800 data base plan would be in the public interest. *See* Notice of Proposed Rulemaking,102 FCC 2d at 1393-94; and Supplemental Notice of Proposed Rulemaking 3 FCC Rcd at 725.

[10] 4 FCC Rcd at 2829, para. 39.

[11] The nine LECs include the seven regional BOCs, GTE, and United.

[12] *See, e.g.*, NYNEX petition at 7-10; Pactel Petition at 3-6; United Petition at 1-8; and US Sprint Petition at 5-14.

10. After the petitions for reconsideration had been filed and comments and reply comments received, the United States District Court for the District of Columbia administering the Modification of Final Judgment (MFJ)[13] issued a decision affecting BOC provision of SS7. The Court ruled that the BOCs may not deliver or receive the SS7 signaling information associated with an interLATA call to or from the interLATA carrier outside the local access and transport area (LATA) in which the call originates or terminates. [14] This decision effectively requires each BOC to establish a signal transfer point (STP) that serves as a signaling point of interconnection (SPOI) in each LATA in which a BOC offers SS7 interconnection with interexchange carriers." [15]

11. Because this decision (hereinafter the "SPOI" decision) altered some of the assumptions underlying the initial reconsideration pleadings in this docket, the BOCs filed a joint letter in December 1990 showing revised SS7 deployment plans and modifying their reconsideration requests. In their letter, the BOCs agree with earlier submissions of Bell Atlantic and MCI that access times under a data base system would be 0.9 seconds less for all SS7 architectures than previously projected. [16] They also state, however, that in light of the SPOI decision and other factors, they will be unable to offer SS7 interconnection at all of their access tandems by the end of 1991, as previously represented. [17] They state that under their revised SS7 plans, access times at the end of 1993 for data base 800 traffic will be as follows:

Percentage of 800 Traffic

Access Time (seconds)	All	BellSouth
0.8	38	64
1.0	30	21
4.1	18	9
4.8	3	6
8.1	11	0

Access Time (seconds)	Bell Atl.	Amer.
0.8	76	0
1.0	14	34
4.1	0	57
4.8	8	0
8.1	2	9

Access Time (seconds)	SWBT	NYNEX
0.8	50	37
1.0	24	25
4.1	8	23
4.8	0	0
8.1	18	15

Access Time (seconds)	PacTel	US West
0.8	0	31
1.0	[illegible]	13
4.1	0	11
4.8	0	0
8.1	12	45[18]

Subsequently, US West further revised its SS7 deployment plans. US West now projects that at the end of 1993, its data base system access times would be 1.0 second or less for 6 of its 800 traffic, 4.1 seconds for 18%, and 8.1 seconds for 19%. It states that if the SPOI decision is reversed, it will be able to reduce all of its 8.1 second traffic to 4.1 seconds within this same time frame. [19] SWBT later added that it would commit to eliminating 8.1 second access time by the end of 1995, if it received timely relief from the SPOI decision. [20]

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[13] United States v. AT&T, 552 F. Supp. 131 (D. D.C. 1982) (MFJ), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983); United States v. AT&T, 569 F. Supp. 1057 (D. D.C.) (Plan of Reorganization), *aff'd sub nom.*, California v. United States, 464 U.S. 1013 (1983).

[14] United States v. Western Electric,131 F. R. D. 647 (D. D.C. 1990), *recon. denied*, 1990 WL 139788 (D. D.C. Sept. 6, 1990). The term "LATA" is used in MFJ proceedings to describe an area in which the MFJ permits a BOC to provide end-to-end service. Most interstate interexchange service is classified as "interLATA" for purposes of the MFJ.

[15] US West is currently appealing this decision.

[16] *See* Bell Atlantic Petition at 6 and Bell Atlantic Reply at note 14 (arguing that access times would only be. 6 or 2.2 seconds greater than under NXX access). *See also* letter from Donald F. Evans, Director, Technical [sic] Regulatory Affairs, MCI, to Richard M. Firestone, July 13, 1990 (agreeing with Bell Atlantic).

[17] US West stated that unless the SPOI decision is reversed on appeal, SS7 interconnection will be deferred indefinitely in some of its LATAs.

[18] As set forth in detail in the BOC letter of December 1990, the various access times reflect different originating 800 access architectures. Factors affecting access time include: (1) the location in the LEC network of the Service Switching Point (SSP), which launches, via the SS7 network, the data base query that reveals the identity of the IXC selected by the 800 subscriber; (2) the extent to which the LEC can use SS7 to transmit call signaling information within its network, between end offices and access tandems, for example; (3) the level of LEC/IXC voicepath interconnection; and (4) the availability of LEC/IXC SS7 interconnection for the transmission of call signaling information between the LEC and the IXC. An access time of 0.8 seconds, for instance, requires LEC deployment of SS7 and an SSP in the end office, and the transmission of originating 800 traffic directly from that end office to the IXC POP with SS7 signaling interconnection.

BellSouth and NYNEX provide the percentage of originating 800 traffic that will be served at the end of 1993 by end offices or access tandems equipped for SS7 interconnection. Actual interconnection at some of these offices might require additional time (for pre-service testing and implementation of interconnection with all IXCs). The other BOCs present percentages of originating 800 traffic for which SS7 interconnection will be completed.

[19] Letter from Elridge A. Stafford, Director-Federal Relations, US West, to Donna R. Searcy, Secretary, FCC, June 21, 1991.

[20] Letter from Janis R. Atherton, Manager-Federal Regulatory, SWBT, to Gary Phillips, FCC Common Carrier Bureau, March 14, 1991.

12. GTE also supplemented its pleadings, noting that the United States District Court for the District of Columbia has not yet ruled on whether, under the GTE Consent Decree, GTE must place a SPOI in each LATA in which it offers SS7 interconnection. GTE states that a favorable ruling on its waiver petition would enable it to reduce access times for all of its 800 service traffic to 4.1 seconds or less by the end of 1992, but that an unfavorable ruling would significantly impede its ability to reduce access times under a data base system in a timely manner.

13. Several parties have updated their positions in light of this new information. We describe below the positions of the parties as updated, when applicable, or as set forth in their initial pleadings.

14. A number of BOCs now contend that we should permit implementation of mandatory 800 data base access, on either a nationwide or regional basis, when 80% of originating traffic is subject to a call access time of 5 seconds or less. [21] Bell Atlantic suggests as a further condition that 100% of a LEC's originating 800 traffic meet that standard within two years thereafter. [22]

15. MCI supports reconsideration of the Order's eighty percent standard and proposes that the data base system become mandatory when LECs make SS7 interconnection available at all LEC access tandems or at SPOIs within each LATA. [23] MCI asserts that the SPOI decision should not have significantly: affected BOC SS7 deployment plans. It states that the costs of deploying a SPOI in each LATA are not excessive (about $1-2 million per LATA), and that the BOCs are free to seek any necessary interim waivers of the SPOI decision. [24] MCI also asks us to encourage LEC deployment of SS7 interconnection by removing SS7 and 800 data base costs from each LEC's interstate access charges, at least until that LEC provides SS7 interconnection. US Sprint reaffirms the position in its reconsideration petition that access times of five seconds or less would not represent a material degradation of 800 access service, but now asks us to require the BOCs to meet this standard "as soon as possible, and certainly no later than the end of 1992." [25]

16. In their initial comments responding to the reconsideration petitions, the TSP Coalition and CompuServe opposed changes to the Order's eighty percent standard, arguing that data base access from the tandem, even with SS7 interconnection, would disadvantage transaction service providers by increasing post-dial delay. Other user groups, including Ad Hoc, NDC, DMA, and ARINC, argued that while future revisions to the standard might be appropriate, such changes should await hard data about actual (as opposed to projected) delays under the data base plan and the effects of these delays on subscribers.

17. Following the submission of the BOCs' joint letter in December 1990, Ad Hoc, NDC, and two of the four members of the TSP Coalition (Visa/MasterCard) have revised their positions. Ad Hoc now states that the Commission should permit each RBOC to eliminate NXX access when at least 90% of that RBOC's originating 800 traffic experiences an access time of 5 seconds or less, and 65% experiences an access time of 1.0 second or less, provided that two years thereafter, access time for all of its traffic is no more than 1.9 seconds.[26] Visa/MasterCard suggests a similar standard, based: on mean access times.[27] NDC urges retention of the eighty percent standard for the first two years of data base access, with a tougher (100%) standard thereafter.[28] Although ICA did not file a response to the reconsideration petitions, ICA now argues that no 800 traffic should have access times of more than five seconds during the first two years of data base access, but otherwise adopts the Ad Hoc position. ICA also urges that to encourage BOCs to meet this standard, we should announce that we will remove 800 data base expenses and investments from the rate base of any BOC that has not met appropriate access time standards by the end of 1996.

18. AT&T initially opposed a relaxation of the eighty percent standard, but now suggests a blending of the ICA and Ad Hoc tests. [29] Other IXCs oppose reconsideration of the eighty percent standard, though for different reasons. Allnet, denying the importance of number portability, argues that the eighty percent standard represents a

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[21] *See, e.g.*, Letter from Gary J. Dennis, Director, Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC, April 23, 1991 (advocating 80% standard applied on a nationwide basis); Letter from Francis L. Hopwood, Director, Federal Regulatory Relations, PacTel, to Donna Searcy, Secretary, FCC, March 8, 1991 (advocating 80% standard for Pacific Bell); Letter from Janis Atherton, Manager, Federal Regulatory, SWBT, to Donna Searcy, Secretary, FCC, February 5, 1991 (advocating 82% standard for SWBT).

[22] Letter from Marie Stasiorowski, Director FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, January 23, 1991.

[23] *See* MCI Comments at 9-13; and letter from Donald F. Evans, Director, Technical [sic] Regulatory Affairs, MCI, to Richard M. Firestone, Chief, Common Carrier Bureau, July 13, 1990 (hereinafter "July 1990 MCI letter").

[24] US West and Ameritech dispute MCI's claims about the cost of deploying STPs. US West states that an STP pair meeting US West's requirements costs at least $3 million. Letter from Elridge A. Stafford, Director-Federal Relations, US West, to Donna R. Searcy, Secretary, FCC, July 3, 1991. Ameritech claims that STP pairs cost almost $4 million, including right to use fees for STP software. Letter from Fred K. Konrad, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, July 22, 1991. AT&T, on the other hand, states that the dollar investment required for "full deployment" of SS7 is not substantial in relation to LECs' normal construction budgets. Letter from Thomas H. Norris, Corporate Vice President, Federal Regulation Division, AT&T, to FCC Commissioners, June 14, 1991.

[25] Letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint, to Richard M. Firestone, Chief, Common Carrier Bureau, June 20, 1991.

[26] Letter to Donna R. Searcy, Secretary, FCC, from James S. Blaszak, Counsel, Ad Hoc, April 5, 1991.

[27] VISA/MasterCard proposes that, during the first two years of data base access, mean access time for the RBOC's traffic be 2.0 seconds, plus or minus. 5 seconds. *See* letter from Henry D. Levine, Ellen G. Block, and Joan E. Neal, Counsel for VISA and MasterCard, to Donna R. Searcy, Secretary, FCC, April 23, 1991. *See also* letter from Ellen G. Block to Donna R. Searcy, May 2, 1991.

[28] Letter from Joseph P. Markoski, Counsel for NDC, to Donna R. Searcy, Secretary, FCC, June 18, 1991. NDC would allow limited waivers of the 4.1 second ceiling on access times -- the ceiling effectively set by the Order's requirement that SS7 interconnection be made available at all access tandems -- for BOCs that beat the eighty percent standard.

[29] AT&T contends that each RBOC should be permitted to implement mandatory data base access when it has reduced

reasoned balancing of the conflicting considerations of access delay and number portability. ATC, on the other hand, states that number portability is necessary to full competition in 800 and other interexchange services, but opposes a revised standard on the ground that users would probably attribute post-dial delay increases to the inferior quality of small IXCs' networks. ATC instead asks us to mandate rapid end office deployment of SS7. Finally, ACTA states that many of the smallest IXCs use switches that will not be capable of receiving SS7 signaling from the LECs in the near future, and therefore asks that if we expedite implementation of the data base plan, we permit each IXC to receive at least one NXX code off the plan, so that small IXCs can offer an 800 service without excessive post-dial delay.[30]

C. Discussion

19. We now modify the Order by revising our access time standard for discontinuance of NXX 800 access and by requiring the BOCs and GTE to meet this standard within eighteen months from the date of release of this Order. Under our revised standard, each LEC will be permitted to withdraw NXX access in favor of mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, *provided that,* within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the *mean* access time for all of its 800 data base traffic is 2.5 seconds or less. We require the BOCs and GTE to meet this standard within eighteen months from the date of release of this order so that a nationwide data base system of access that permits number portability can be implemented at that time. To provide for a well-managed transition to 800 data base access, we direct the BOCs and GTE to work with the industry, through the Carrier Liaison Committee, to address issues related to the implementation and administration of the data base system. We require the BOCs and GTE to file a plan for transitioning to 800 data base access in accordance with this order with the Chief of the Common Carrier Bureau no later than March 1, 1992.

20. We revise the eighty percent standard because we agree with petitioners that this standard places too much weight on access time and not enough on number portability, particularly in light of new information that access times under the data base system will be .9 seconds less than previously projected. Indeed, the eighty percent standard would effectively condition the availability of number portability on obtaining *better* access times than exist today. The mean access time for NXX access today is approximately 2.5 seconds, while the eighty percent standard would result in a mean access time of about 1.6 seconds.[31] Thus, the standard adopted in the Order is more rigorous than necessary to meet our goal of ensuring that data base access does not degrade the quality of the nation's 800 access service. Given the significant benefits that number portability can bring to consumers, through heightened 800 service competition and increased choices -- benefits that the Commission acknowledged in the Order -- we find that the eighty percent standard is not in the public interest.

21. A better standard, we conclude, is one that tolerates at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today. The standard that we now adopt will meet these objectives. First, it ensures that virtually no callers of 800 numbers will experience access times of more than five seconds or an increase in access time of more than three seconds.[32] It thereby addresses concerns that there not be a substantial increase in access time for individual calls under a data base system, and, in particular, that only an insignificant amount of traffic would experience 8.1 second access times.[33] Second, the standard ensures that within two years of implementation of the data base system, average access time will be at least as good as it is today under NXX access. Indeed, because this standard applies to each LEC, it will result in access times that are significantly better than they now are. We note, for example, that by the end of 1993, three BOCs plan to reduce access time to one second or less for over 85% of their 800 traffic, and that six BOCs plan to achieve these levels for over 60% of their 800 traffic.[34] These BOCs will achieve average access times of about two seconds or less. In addition, as the BOCs increase end office SS7 deployment over time, average access times will continue to decline.

22. Because the access time standard that we now adopt eliminates excessive delays, we decline to require LECs to retain a limited NXX access option once they implement mandatory data base access.[35] There is no evidence that users need or would use a limited NXX option under the circumstances. [36] Nor has ACTA sufficiently detailed its

access times to 1.0 second or less for 65% of its traffic, 4.1 seconds or less for 90% of its traffic, and 5.0 seconds or less for all of its traffic, provided that the access time for all traffic is reduced to 1.9 seconds or less within two years. Letter from Thomas H. Norris, Corporate Vice President, Federal Regulation Division, AT&T, to FCC Commissioners, June 14, 1991.

[30] Allnet Comments at 2-5; ATC Comments at 3-5; ACTA Comments at 3-4.

[31] Under the NXX system, approximately two thirds of the nation's 800 traffic experiences an access time of 1.9 seconds, and one third experiences an access time of 3.5 seconds. Under the Order's eighty percent standard, 80% of originating 800 traffic would experience an access time of no more than 1.0 seconds, while the remaining traffic would experience an access time of no more than 4.1 seconds.

[32] The record indicates that the five-second standard will, in fact, result in access times of 4.1 seconds or less for most 800 traffic. *See* para. 11, *supra.*

[33] To reduce access times to no more than five seconds, LECs must either offer SS7 interconnection with IXCs at the access tandem or deploy an SSP and SS7 capabilities at the end office. During the first two years of data base access, we will permit each LEC to exceed the five second ceiling on access times for up to three percent of its 800 traffic, so as to give each LEC more time to equip its most remote LATAs with SS7 interconnection capabilities.

[34] *See* para. 11, *supra.*

[35] Under this option, a limited number of currently unassigned NXXs would be made available to IXCs so that they could accommodate users that preferred NXX access to data base access.

[36] While transaction service providers are especially sensitive to post-dial delay, the standard that we adopt should result in little, if any, increase in access times for 800 calls. Nor does it

assertion that small IXCs might need an NXX option because of their inability to receive SS7 interconnection.[37] Moreover, an NXX option would require LECs to maintain dual screening systems for 800 calls and to screen most 800 calls twice -- first, to determine whether the call should be routed to the data base, and second, to perform the data base screening functions. Under the circumstances, there is insufficient evidence before us to warrant requiring a limited NXX option. Nevertheless, we do not foreclose a petition to require a limited NXX access option for smaller IXCs if such a petition is supported by specific evidence that mandatory 800 data base access prevents smaller IXCs from offering 800 services.

23. We require the BOCs and GTE to meet our revised access time standard within eighteen months of the date this order is released. While the BOCs argue that we should permit them to reduce data base system access times at their own pace, it does not appear that many BOCs would achieve acceptable access times on their own before perhaps the mid-1990s.[38] For the reasons discussed below, this result would be unjust, unreasonable, and contrary to the public interest. We therefore direct that our access time standards be met within eighteen months from the release of this order so that a nationwide data base system of access that permits number portability can be implemented at that time.[39]

24. We recognize that the MFJ court's SPOI decision makes it more costly for the BOCs to meet this standard within eighteen months. Nevertheless, it does not appear that from a public interest standpoint, the cost of complying with this standard within eighteen months outweighs the benefits of obtaining 800 data base access in that time frame. Rather, the record sets forth support for the importance of early implementation. Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace,[40] the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services:, marketplace, but provide customers with more flexibility and more options in designing their 800 service. Moreover, the SS7 technology that will be used for the data base system will increase the efficiency of the LEC networks generally, and of call set up in particular, and make possible the provision of a number of other valuable services by LECs and IXCs.

25. At the same time, the costs of meeting these requirements should not be unreasonable and do not justify a delay in implementation.[41] For most of the BOCs, the standards that we adopt require only a modest acceleration in their SS7 deployment plans. Even for those BOCs that are potentially affected the most by our requirement, the record indicates that the costs of meeting these requirements would not be excessive.[42] On the other hand, we recognize that if the District Court precludes GTE from offering SS7 interconnection across LATA boundaries, the cost to GTE of complying with our standard could increase substantially. If that occurs, and GTE cannot obtain an interim waiver from the court, GTE is free to seek a limited waiver of our access time standards on grounds that it could not reasonably meet these standards within our deadlines.

26. We decline to mandate participation in the data base system by ITCs other than GTE. Data provided earlier in this proceeding indicates that LECs representing 98.7% of the nation's access lines will voluntarily participate in the data base plan and that they have a variety of low-cost options available to them for doing so.[43] No one claims that this is no longer true. Therefore, we see no need at this time to require participation in this access system by ITCs other than GTE. If it appears, however, from the transition plan described below that ITCs are not moving forward with plans for participating in data base access, we will revisit this question.

27. A nondisruptive, operationally sound implementation of 800 data base access is critical. A number of steps must be taken to implement data base access. First, the BOCs and GTE must implement improvements in their (own networks for 800 data base access. They will have to upgrade their SS7 networks by installing STPs and implementing SS7 interconnection sufficient to meet our access time standards.[44] In addition, they must upgrade their 800 data bases (or Service Control Points (SCPs))

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appear that transaction service providers view a limited NXX option as an attractive option. *See* TSP Coalition Comments at 6; NDC Comments at 8-9.

[37] ACTA failed to provide detailed information substantiating its general assertions on this point, even after requests by Common Carrier Bureau staff.

[38] *See, e.g.*, Letter from Jeffrey S. Bork, US West, to Donna R. Searcy, Secretary, FCC, April 19, 1991; Letter from Janis R. Atherton, Manager, Federal Regulatory, SWBT, to Gary Phillips, FCC Common Carrier Bureau, March 14, 1991.

[39] While our eighteen-month deadline will require some acceleration in current BOC and GTE SS7 deployment plans, the record indicates that this deadline can be met without any undue burden. *See, e.g.*, letter from Marie B. Stasiorowski, Director, FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, July 3, 1991 (projected timeframe for transitioning to full service 800 data base is 18 to 24 months); letter from Donald F. Evans, Director Federal Regulatory Affairs, MCI, to Donna R. Searcy, Secretary, FCC, Feb. 22, 1991 (800 number portability can be accomplished by early 1993); and letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint, to Richard M. Firestone, Chief, Common Carrier Bureau, June 20.1991 (asking us to require the BOCs to deploy SS7 at all tandems no later than year-end 1992).

[40] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, adopted August 1, 1991.

[41] *See* para. 15 and note 24, *supra*. We note that the eighteen-month period in this Order will give the BOCs and GTE until 1993 to meet access time standards that will support our goal of a nationwide 800 data base system that permits full number portability. After weighing the various factors that could affect BOC and GTE SS7 deployment schedules, we find that eighteen months is a sufficient and reasonable transition period. *See* note 39, *supra*.

[42] *See* para. 15 and note 24, *supra*. Moreover, any BOC is free to seek an interim waiver of the SPOI decision either before or after the appeal is decided, and both MCI and AT&T have indicated that they would not oppose a narrowly drawn interim waiver request. *See* letter from Donald F. Evans, Director, Federal Regulatory Affairs, MCI, to Donna R. Searcy, Secretary, FCC, February 22, 1991; AT&T's Response to US West's Motion for a Declaratory Ruling or, in the Alternative, for a Waiver of the Decree, Civil Action No. 82-0192, March 15, 1989, at 9-10.

[43] *See* Order, 4 FCC Rcd at 2829, note 90.

[44] SS7 interconnection involves the installation of "gateway" software in LEC STPs, which permits them to act as SPOIs, and actual interconnection with IXCs.

now being used for intraLATA 800 service with the additional processors and software necessary for mandatory 800 data base access. The BOCs and GTE must also connect their 800 data bases to the Service Management System (SMS), the national system for creating and updating subscriber 800 records, through geographically diverse data links. Each of these actions requires preimplementation testing to ensure reliability. Second, the national administration of the 800 data base access system needs to be put into place. This requires the establishment of the SMS, including the loading of IXC 800 customer information, as well as sufficient testing to ensure the accuracy and integrity of that customer information. The carriers must also provide reliable IXC access to the SMS and select a third party administrator for the SMS. Third, LECs must ensure that ITCs can participate in the 800 data base plan through any of a number of options open to those ITCs. The larger LECs have committed to working with smaller ITCs to implement 800 data base access ubiquitously, and that commitment must be met.

28. To ensure an orderly transition to 800 data base access, we require that the BOCs and GTE file a detailed implementation plan with the Chief of the Common Carrier Bureau (the "Bureau") by March 1, 1992, and we direct the Bureau to establish a schedule for public comment on that plan.[45] The plan shall include a detailed report on the progress of the BOCs, GTE, and other interested parties in taking the steps described above for implementation of 800 data base access. It shall include a specific description of the steps that have been taken to ensure a timely and nondisruptive implementation of 800 data base access, as well as a description of and timeline for necessary future actions. Special emphasis shall be placed on the steps being taken to ensure data base and network reliability in the provision of SS7 interconnection and 800 data base access. The plan shall also report on the progress in making arrangements for ITC participation in 800 data base access. In addition, it shall set forth procedures for notifying 800 subscribers reasonably in advance of any change in their 800 service so that subscribers can make any necessary adjustments to reflect changed call set-up times and the availability of vertical service options. Finally, the plan shall describe any other steps that may be necessary for 800 data base access implementation, and also issues upon which agreement has not been reached among interested parties.

29. The imposition of the standards and requirements adopted herein is well within our general authority to ensure that carriers subject to our jurisdiction furnish communications service upon reasonable request, in a just, reasonable, and nondiscriminatory manner, and with adequate facilities.[46] The Commission has exercised this authority in the past by requiring carriers to provide facilities necessary to achieve the goals and requirements of the Communications Act. For example, the Commission has required LECs to provide equal access facilities to IXCs based on a finding that the public interest benefits of our requirements outweighed any burdens imposed on the affected telephone companies. [47] We make a similar finding in this instance [48] and conclude that the standards and requirements adopted herein serve the public interest, convenience, and necessity, and that an affected LEC's failure to meet them would be an unjust and unreasonable practice.

IV. ENTITIES TO WHICH LECS SHOULD BE ALLOWED TO SELL VERTICAL FEATURES

A. The Order

30. The Order permitted LECs to offer vertical features, but only to their own intraLATA 800 service subscribers and to IXCs and other purchasers of interstate access. [49] The Order prohibited LECs from providing vertical features directly to an IXC's 800 service customers for use in connection with their interLATA 800 service. The Order based this prohibition on concerns that the provision of vertical features by LECs to an IXC's 800 service subscribers could interfere with the relationship between IXCs and their customers, harm interexchange competition, and impede the ability of IXCs to manage traffic flow over their own networks.

B. Positions of the Parties

31. Most BOCs, USTA, GTE, and TCA request reconsideration of the Order's restriction on the sale of vertical features by LECs to IXC 800 service subscribers.[50] These parties argue that the restriction is inconsistent with FCC policy prohibiting use restrictions, and that alleged concerns about protecting the relationship between IXCs and their customers are misplaced since LECs already sell access services to IXC customers without interfering with this relationship. LECs also deny that the sale of vertical features by LECs to IXC customers would compromise the ability of IXCs to manage traffic flow over their own networks.

32. Ad Hoc, NDC, and ARINC support the petitions for reconsideration of the Order's restrictions on the sale of vertical services. They assert that IXCs will have no incentive to market multiple carrier routing, and that requiring subscribers to order vertical features through IXCs creates an additional administrative layer and unnecessary transaction costs. Ad Hoc and NDC, supported by TCA, ask that if we affirm the restriction on LEC sales of vertical features to end users, we also require IXCs to offer any

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[45] The BOCs and GTE should work with other industry members in developing this implementation plan.

[46] *See* 47 U.S.C. §§ 154(i); 201-205; 214. *See also* 47 U.S.C. § 151 (empowering the Commission to regulate interstate and foreign commerce so as to make available "rapid, efficient, Nation-wide. . . communication service with adequate facilities at reasonable charges.")

[47] Investigation of Access and Divestiture Related Tariffs,101 FCC 2d 911 (1985), *modified*, 101 FCC 2d 935 (1985); *modified on reconsideration* 102 FCC 2d 503 (1985); Illinois Citizens Utility Board Petition for Rulemaking, 2 FCC Rcd 1726 (1987); MTS and WATS Market Structure Phase III, 100 FCC 2d 860 (1985). *See also* Public Coast Radiotelegraph Stations, 67 FCC 2d 790-821-22 (1978) (acknowledging FCC authority under section 214(d) of the Communications Act to require upgrading of facilities as necessary to serve the public interest, convenience, and necessity).

[48] *See* paras. 23-25, *supra*.

[49] For a description of the vertical services that LECs propose to offer, see para. 5, *supra*.

[50] *See, e.g.*, BellSouth Petition at 6-9; PacTel Petition at 9-12; Bell Atlantic Petition at 3-5; and TCA Petition.

vertical feature that is available from a LEC and requested by a subscriber, provided that the provision of this service would not cause technical harm to the IXC's network.

33. AT&T, MCI, Allnet, and ATC oppose reconsideration of the vertical services restriction. They argue that the Commission properly recognized that LEC provision of vertical features to IXC customers might interfere with IXC/customer relationships and with IXCs' ability to manage traffic flow over their own networks. They argue that in light of these concerns, general policies against use restrictions are inapt. Allnet and MCI claim that the vertical services rule does not, in any case, preclude end users from purchasing vertical features. They claim that any end user that purchases basic 800 access directly from a LEC may also purchase vertical features from the LEC. The rule, they state, simply ties the purchase of vertical services to the purchase of basic access. [51]

C. Discussion

34. We affirm the Commission's decision permitting LECs to sell 800 data base vertical features, but prohibiting LECs from selling such features directly to IXCs' 800 service subscribers for use in connection with interLATA 800 service. The major arguments presented for reconsideration were before the Commission at the time of the Order, and we find them no more convincing now.

35. The Order's vertical services decision balanced a number of conflicting interests and concerns. On the one hand, the Commission concluded that the sale of certain vertical services by LECs "should increase competition in the 800 market generally by enhancing the position of small IXCs."[52] The Commission was also cognizant of the potential for LEC sales of vertical services to increase competition in the provision of these services, and thereby encourage new, innovative vertical features. For these reasons, the Commission decided that LECs should be permitted to provide vertical features. The Commission was also concerned, however, that the direct provision of these services to an interstate 800 subscriber "would potentially interfere with the relationship between the IXC and its customer," which could harm interexchange competition, and unduly disrupt IXCs' ability to manage traffic flow over their own networks.[53] The Commission found as well that direct LEC provision of vertical features to customers of IXC services was not necessary for their availability to 800 subscribers. In particular, the Order rejected arguments that multiple carrier routing would not be available unless LECs were permitted to sell this feature directly to end users. The Order stated that IXCs, especially regional carriers, would have every incentive to market multiple carrier routing to customers.[54] The vertical services decision represented a careful and sensible balancing of the conflicting considerations involved, and we see no reason, based on the record on reconsideration, for disturbing this balance.

36. Some parties now allege that prohibiting the sale of vertical features to IXCs' 800 service subscribers constitutes an impermissible use restriction. These parties misconstrue the Commission's holding. The Commission stated that vertical features are properly part of 800 access service and that "[i]n other contexts, we have generally limited LECs to selling switched access services and features to IXCs and other purchasers of interstate access and not to the customers of IXCs or of other service providers."[55] As MCI observes, this limit on the sale of vertical features is not an impermissible use restriction: any user purchasing basic 800 access is free to purchase vertical services as well.[56]

V. TREATMENT OF SS7 COSTS

A. The Order

37. The Order said that SS7 represents a general network upgrade, the core costs of which should be borne by all network users. This conclusion was based on a finding that SS7 is a new network infrastructure that will not only support a number of new interstate and intrastate services, but also increase the efficiency with which LECs provide existing services. The Order concluded that LECs should apportion SS7 components not incurred specifically for the implementation and operation of the 800 data base system in accordance with existing accounting and separations rules. [57]

B. Positions of the Parties

38. MCI, supported by Allnet, seeks reconsideration of this aspect of the Commission's decision. [58] MCI claims that LEC SS7 networks are being deployed primarily to support LEC intrastate service offerings and that optional 800 data base service is the only interstate access service for which LEC SS7 networks may currently be used. According to MCI, the treatment of SS7 as a general network upgrade is therefore at odds with principles of cost-causative pricing. MCI acknowledges that once SS7 interconnection is available, it would not be inappropriate to spread SS7 costs among all switched access services, but asks that, until then, the costs of SS7 be directly assigned to the specific services that are using these systems.

39. The BOCs, USTA, NDC, and Ad Hoc oppose MCI's petition. The BOCs generally argue that their SS7 networks will benefit all customers. Bell Atlantic states that it already uses its SS7 network to transmit traffic between certain tandem switches and end offices. It states that, contrary to MCI's claims that these networks currently provide no benefits to IXCs, this reduces terminating

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[51] *See* AT&T Comments at 7-10; MCI Comments at 2-9; Allnet Comments at 5-7; and ATC Comments at 7-8.

[52] 4 FCC Rcd at 2830, para. 56.

[53] *Id.* at 2831, para. 57.

[54] *Id.* at 2831, para. 58.

[55] 4 FCC Rcd 2830-31.

[56] Because we believe that competition in the provision of 800 services will be vigorous after implementation of the data base system, we need not require IXCs to offer any vertical feature that is available from a LEC and requested by a subscriber (even if the provision of this feature would not cause technical harm to the IXC's network). Once the data base system is implemented, competition should ensure that carriers accommodate the needs and desires of 800 users for vertical features.

[57] 4 FCC Rcd at 2832-33, paras. 70-74.

[58] MCI Petition at 4-15; Allnet Comments at 8.

access time by nearly fifty percent. [59] Some BOCs also argue that the separations process will properly allocate costs between jurisdictions based on relative use, and that MCI has not shown such rules to be inadequate. [60] In addition, they argue that the Commission has rejected a service-specific approach to cost accounting. NYNEX claims that if MCI's approach were adopted, the BOCs would have to undertake new cost studies every time a new use was made of common network components. [61] Finally, SWBT argues that the Order properly recognizes that to encourage innovation and the prompt introduction of new technologies, all costs cannot be loaded onto the first service using this technology. [62]

C. Discussion

40. We are not persuaded that the introduction of SS7 requires any change in existing accounting or separations rules. These rules were designed to accommodate the implementation of new services and technology. MCI has not demonstrated that application of existing rules to SS7 facilities will produce inequitable or uneconomic results.[63]

VI. PROVISION OF POTS NUMBERS BY IXCs

A. The Order

41. The Order requires IXCs to provide LECs with the POTS numbers of 800 service subscribers that use a LEC for intraLATA 800 service, either by choice or because of state regulatory restrictions on intraLATA competition.[64]

B. Positions of the Parties

42. MCI, supported by Allnet, claims that this requirement is unnecessary and overbroad and interferes with IXC interests in protecting proprietary information about their customers. According to MCI, the requirement is unnecessary because it has never been shown that IXCs have violated state restrictions on intraLATA competition. In addition, it argues that it should be a LEC's responsibility to obtain information about the POTS numbers of its own 800 subscribers, and not the responsibility of the IXC that provides interLATA service to these subscribers. MCI states that the requirement is overbroad, since it requires IXCs to provide to the Service Management System (SMS) information that may be of concern to only one LEC.[65]

43. Several BOCs oppose MCI's petition. They argue that without the POTS number, they would have to route their intraLATA traffic to an IXC for translation and then have the call redelivered. They also dispute that the POTS number of a customer with shared service is proprietary to the IXC.[66] Finally, they argue that MCI's concerns about the confidentiality of information loaded into the SMS are unfounded in light of the elaborate security protections built into the SMS. In addition, PacTel asserts that MCI wishes to withhold the POTS number of shared customers so that MCI improperly may continue to keep revenues for intraLATA traffic. [67]

C. Discussion

44. We now modify the Order to eliminate the requirement that IXCs provide LECs with the POTS numbers of IXC customers that use a LEC for intraLATA 800 service. In establishing this requirement, the Commission stated that LECs need the POTS number in order to identify their own intraLATA traffic. This is correct. It is not at all clear, however, why we should charge IXCs with the obligation to provide this information to LECs. If an 800 subscriber has chosen to use a LEC for its intraLATA 800 service, that LEC should be able to obtain the necessary information to serve the subscriber. We are not convinced, as BellSouth claims, that customers might be unable to obtain this information. Moreover, to the extent that LECs have rights to intraLATA 800 traffic solely by virtue of state restrictions on intraLATA competition, those states are generally free to take any necessary and appropriate action to enforce such restrictions, including requiring IXCs to provide LECs with the POTS numbers of intraLATA 800 service users. Thus, in eliminating the requirement that IXCs provide LECs with the POTS numbers of IXC customers using a LEC for intraLATA 800 service, we do not preempt states from imposing such a requirement.

VII. OTHER ISSUES

A. SMS Administration

45. In previous stages of this proceeding, certain IXCs objected to BOC plans to use Bell Communications Research (Bellcore) as the administrator of the SMS. In response to these objections, the BOCs agreed to transfer administration of the SMS to an independent third party.[68] SWBT now asks us to clarify that Bellcore may continue administering the SMS until the BOCs substan-

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[59] Bell Atlantic Comments at 3.

[60] *See, e.g.*, BellSouth Comments at 9-10; SWBT Comments at 6.

[61] NYNEX Comments at note 19.

[62] SWBT Comments at 3-4.

[63] USTA asks us to "clarify" that carriers joining access tariffs filed by the National Exchange Carrier Association (NECA) need not "engage in any particular federal accounting or tariffing as a result of the [Order]." USTA Petition at 8. USTA's request is unclear. The Order does not change accounting requirements for any carrier. Any NECA carrier that offers vertical services will, however, be subject to the unbundling requirements governing the provision of such features. *See* paras. 47-51, *infra*.

[64] 4 FCC Rcd at 2836.

[65] MCI Petition at 15-21. *See also* Allnet Comments at 8-9. The SMS is the central 800 data base that will be used for 800 number search and reservations functions and 800 order entry. The SMS will download 800 service information to regional LEC data bases at regular intervals. *See* 4 FCC Rcd at 2844, n. 127.

[66] *See* Bell Atlantic Comments at 4; BellSouth Comments at 10; SWBT Comments at 12; USTA Comments at 8. BellSouth also maintains that subscribers with 800 service terminating on a dedicated line may not know their POTS number. BellSouth Comments at 11.

[67] PacTel Comments at 7-8.

[68] 4 FCC RCd at 2834-35.

tially withdraw NXX access. SWBT claims that as a result of the Commission's decision to allow IXCs to continue receiving NXX access, the data base system is little used and that retaining a third party administrator under the circumstances would not be cost-effective.[69] MCI responds that a third party administrator likely would be more cost-effective than Bellcore, since that administrator would be chosen pursuant to a competitive bidding process that considers cost factors.

46. We expect the BOCs to honor their commitment to transfer the administration of the SMS to a neutral third party. The implementation plan filed on March 1, 1992, shall include a description of the progress made toward selection of such a third party administrator.

B. Bundling of 800 Access Costs

47. The Order required LECs to offer data base access through separate subelements for carrier identification and for the various vertical features, but did not adopt specific Part 69 rule changes in light of the Commission's concurrent initiation of a proceeding to consider policies for establishing subelements of the existing Part 69 rate elements. [70] PacTel, claiming that POTS translation and call validation do not create discrete costs, seeks reconsideration of the requirement that these vertical features be unbundled from basic 800 access service.[71] Bell Atlantic argues that there should be no discrete charge even for basic 800 access. It states that costs uniquely associated with 800 data base service would be only .14% (.0014) of its switched access revenue requirement and are thus too small to be treated differently from other access costs.[72]

48. MCI, Ad Hoc, NDC, and ARINC oppose these petitions, claiming that the unbundling requirements of the Order are necessary to ensure that LECs do not cross-subsidize vertical services with basic 800 access or other services.[73] MCI states that any waiver of this policy, for good cause and based on a proper factual showing with accurate cost data, should be considered, if at all, only in the context of specific tariff filings.

49. We deny the Bell Atlantic and PacTel petitions for reconsideration of the unbundling requirements. Throughout the course of this proceeding, both Bell Atlantic and PacTel have argued vigorously that the availability of optional vertical features from LECs would promote competition in the 800 services marketplace. Now Bell Atlantic and, to a more limited extent, PacTel seek to price these vertical services in a way that would effectively require all purchasers of 800 access to obtain vertical services from a LEC. Although these LECs claim that the discrete costs involved do not justify separate Part 69 subelements, neither has shown this to be the case with any particularity.

50. A number of IXCs have or will have their own data base systems and will seek to use these systems to provide vertical services to their customers. Absent a more convincing showing that the costs of providing particular vertical services are inconsequential, we will not in effect require IXCs that would otherwise provide vertical services themselves to purchase these services from a LEC.

51. As noted above, the Commission has not previously established specific Part 69 rules governing 800 access service. We have decided that Part 69 rule changes for 800 access should be implemented in this proceeding rather than in the *Part 69/ONA* proceeding. We will require LECs offering 800 data base access services to create a separate Part 69 access element, with separate subelements for each vertical feature. We do not adopt specific Part 69 rules at this time, however, pending the resolution of the remaining pricing and rate structure issues described below in the Second Supplemental Notice of Proposed Rulemaking.

C. Data Base Access for Small ITCs

52. Alltel asks for clarification that the FCC expects BOCs to enable ITCs to use the BOCs' data base systems in a way that enables ITCs to resell data base access to customers on a transparent basis. It asks that BOCs be prohibited from offering 800 data base service to customers in ITC areas pending full SS7 deployment.[74] Alascom asks us to clarify that ITCs may provide 800 access service in the manner best tailored to their individual needs.[75]

53. We remind large LECs that they have represented that that they will cooperate with small ITCs so as to ensure the ability of these ITCs to participate in the data base plan in a viable manner. In the Order, the Commission noted that ITCs have a number of options for participating in the data base plan, [76] and we conclude that ITCs generally should be able to use any of these approaches or other feasible means of participation. Given the options available to ITCs and data submitted by LECs earlier in this proceeding revealing that virtually all ITCs would voluntarily participate in the data base plan, we see no need to limit BOCs from serving customers in ITC areas, as requested by Alltel.

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[69] SWBT Petition at 8-9. On May 4, 1990, NYNEX filed an *ex parte* letter on behalf of itself and the other BOCs informing us that, in light of these considerations, selection of a third party administrator of the data base system has been deferred until the timing of full deployment of 800 data base service is clear. Letter from G. R. Evans, Executive Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, dated May 4, 1990. On May 16, 1990, Allnet filed a response claiming that the BOCs were reneging on their commitment in violation of the Order and asking us to bring an enforcement proceeding against them. Letter from Roy L. Morris, Director, Public Policy and Government Affairs and Deputy General Counsel, Allnet, May 16, 1990.

[70] 4 FCC Rcd at 2833. *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, 4 FCC Rcd 3983 (1989).

[71] PacTel Petition at 8.

[72] Bell Atlantic Petition at 8.

[73] MCI Comments at 18-19; Ad Hoc Comments at 13-14; NDC Comments at 13-15; ARINC Comments at note 3.

[74] Alltel Petition at 5-6.

[75] Alascom Comments at 4. Alascom filed its comments one day late and asks that we accept these comments. Since acceptance of these comments would serve the public interest and no party would be prejudiced thereby, we grant this request.

[76] *See* 4 FCC Rcd at 2829.

D. 800 Number Assignment

54. MCI, supported by Allnet, asks us to rule that 800 number assignment policies constitute terms, conditions, and practices associated with the provision of 800 access service, which should be included in access tariffs.[77] MCI claims that leaving 800 number administration issues solely to the charge of industry forums raises fundamental concerns about fairness and potential conflicts of interest. Allnet states that smaller IXCs lack the resources to monitor regularly BOC activities at industry forums. Allnet also states that it has serious concerns with the guidelines currently under consideration. Several BOCs oppose MCI's petition.

55. We deny the request of MCI to require the tariffing of 800 number administration guidelines. Industry forums have, to date, successfully resolved many of the issues that have been referred to them, including issues relating to 800 service and to number administration. We have no reason to assume at this point that the Carrier Liaison Committee will be unable fairly to address any 800 number administration questions that are still before it.

E. Continued Use of Percentage of Interstate Use (PIU) Reports

56. The Order declined to require IXCs to provide LECs with a "jurisdictional indicator" identifying the location at which each 800 number terminates. The BOCs had claimed that they needed this information so that they could bill access charges more accurately than they can with PIU reports currently provided by IXCs. The Order found no evidence that PIU reports were inaccurate and noted that, in some cases, the jurisdictional indicators requested by the BOCs would provide incorrect data. [78]

57. NTCA seeks reconsideration of this decision. It argues that the decision preserves surrogate methods of determining access charges over more accurate methods using actual data and claims that LECs are vulnerable to tariff shopping and misrepresentation of traffic when PIUs are used. It asks us to clarify that the Order does not preclude the introduction of new, superior access measurement methods in the future as replacements for PIU reports. [79] MCI and Allnet oppose NTCA's petition.

58. We affirm the Order, but clarify that if superior methods for measuring access are developed in the future, we will, if the issue is properly presented to us, consider the merits of such methods vis-a-vis PIU reports. For now, NTCA has offered no new information indicating that PIU reports should be supplanted by other information.

VIII. SECOND SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

59. As noted above, this order requires LECs to offer 800 data base access through separate subelements for carrier identification and the various vertical features. We conclude, particularly in view of the recent implementation of price cap regulation, that it is necessary to seek further comment on the appropriate rate structure and pricing rules for 800 data base access services.

60. First, we seek comment on the pricing structure LECs should use for basic 800 data base access and any vertical features they offer. We tentatively conclude that LECs should price basic 800 data base access on a per query basis. To the extent that commenters suggest alternatives to a per query charge, they should explain how such a pricing structure relates to the way that the costs of providing 800 access services are incurred. We also seek comment on how LECs should price vertical features. Commenters should explain how any proposed pricing structure relates to the way in which the costs of providing such features are incurred.

61. We also seek comment on the pricing of 800 data base access services by both price cap and rate-of-return LECs. For price cap carriers, we must establish rules for initial prices and for subsequent price changes. Since the current NXX access system will be withdrawn when mandatory data base access is implemented, the carrier identification data base service will be a restructured service under the price caps rules, as it will replace, rather than supplement, a current service offering. [80] Restructured offerings of services already under price cap regulation remain in the same price cap baskets and service categories upon restructuring, with adjustments made to the actual price index and service band index to reflect the revised structure. [81] LECs must demonstrate compliance with the price cap and banding limits of the basket to which the service belongs. We seek comment on whether the pricing rules for restructured services are appropriate for setting the initial rates for the carrier identification service. Commenters advocating the use of a different test for the carrier identification service should provide specific proposals in their initial comments.

62. By contrast, the vertical features would be new services under price cap regulation, subject to the flexible cost-based pricing approach recently established in the *Part 69/ONA* order. [82] Under this test, LECs must identify the direct costs of providing the new service, and add overhead costs to compute the initial rate. Uniform loading of overheads is not required, but the LEC's loading

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[77] MCI Petition at 21-24; Allnet Comments at 10.

[78] 4 FCC Rcd at 2835-36.

[79] NTCA Petition at 4-5.

[80] The price cap rules distinguish between new and restructured services for setting initial rates. A new service may be simply a re-priced version of an existing service. As long as the pre-existing service is still offered, however, and the range of alternatives available to consumers is increased, the service is classified as new. Restructured services involve the rearrangement of existing services. When a service has been restructured, the previous version of the service no longer exists. Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, para. 314 (1990); *modified on recon.*, 6 FCC Rcd 2637 (1991); *petitions for further recon. pending, appeal docketed,* District of Columbia Public Service Commission v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[81] *Id.* at para. 322.

[82] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos 89-79 and 87-313, FCC 91-186, adopted June 13, 1991.

methodology must be justified. We tentatively conclude that the new services pricing rules are appropriate for setting the initial rates for vertical services.

63. We propose that 800 data base access services should be in the traffic sensitive switched services basket, and that a new service category, with five percent upper and lower bands, should be created for the 800 data base elements. In addition, we tentatively conclude that creating a subindex for vertical features is necessary to ensure appropriate pricing of these services. We propose that this subindex limit both upward and downward pricing flexibility for vertical features.

64. For rate-of-return carriers, we seek comment on what rule changes are necessary to implement our decision to amend the Part 69 rules to add a new rate element and subelements for 800 data base access services. Commenters are requested to describe the changes in the Part 69 cost allocation rules needed to ensure that 800 data base costs are allocated to the 800 data base elements.

IX. PROCEDURAL MATTERS

A. Ex Parte

65. This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine period, provided they are disclosed as provided in the Commission's rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

66. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendment, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate access services amendment do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure that the special circumstances of the smaller LECs are carefully considered in resolving these issues. The Secretary shall send a copy of this Second Supplemental Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

C. Notice and Comment Provision

67. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§1.415 and 1.419, interested parties may file comments on or before October 21, 1991, and reply comments on or before November 20, 1991. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of your comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 10554. For further information regarding this Order and Second Supplemental Notice of Proposed Rulemaking, contact Gary Phillips, (202) 632-4047, Common Carrier Bureau, Policy and Program Planning Division.

X. ORDERING CLAUSES

68. IT IS HEREBY ORDERED, that Alascom's Motion to Accept Late-Filed Comments is GRANTED, and

69. IT IS FURTHER ORDERED, that pursuant to 47 U.S.C. §§151, 154(i) and (j), 201, 202, 203, 218, 303(r), and 405, and 5 U.S.C. §553, the petitions for reconsideration, partial reconsideration and/or clarification are GRANTED IN PART and DENIED IN PART, as provided herein.

70. IT IS FURTHER ORDERED and NOTICE IS HEREBY GIVEN of the proposed rate structure and pricing of 800 data base access services. COMMENT IS INVITED on these proposals.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

PETITIONS FOR PARTIAL RECONSIDERATION OR CLARIFICATION

ALLTEL Corporation (Alltel)

America's Carriers Telecommunications Association (ACTA)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

GTE Telephone Companies (GTE)

MCI Telecommunications Corporation (MCI)

National Telephone Cooperative Association (NTCA)

NYNEX Telephone Companies (NYNEX)

Pacific Bell and Nevada Bell (PacTel)

Southwestern Bell Telephone Company (SWBT)

Tele-Communications Association (TCA)

United States Telephone Association (USTA)

United Telecommunications, Inc. (United)

US Sprint Communications Company Limited Partnership (US Sprint)

US West Operating Companies (US West)

COMMENTS FILED IN CC DOCKET NO. 86-10

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Advanced Telecommunications Corporation (ATC)

Aeronautical Radio, Inc. (ARINC)

Alascom, Inc. (Alascom)

Allnet Communication Services, Inc. (Allnet)

ALLTEL Corporation (Alltel)

Alternative Carriers Telecommunications Association (ACTA)

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

California Bankers Clearing House Association, the Committee of Corporate

Telecommunications Users, Mastercard

International

Incorporated, and VISA U.S.A., Inc. (TSP Coalition)
Direct Marketing Association (DMA)

CompuServe Incorporated (CompuServe)

Direct Marketing Association (DMA)

MCI Telecommunications Corporation (MCI)

National Data Corporation (NDC)

NYNEX Telephone Companies (NYNEX)

Pacific Bell and Nevada Bell (PacTel)

Southwestern Bell Telephone Company (SWBT)

US Sprint Communications Company Limited Partnership (US Sprint)

United States Telephone Association (USTA)

REPLY COMMENTS FILED IN CC DOCKET NO. 86-10

Allnet Communication Services (Allnet)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

GTE Telephone Companies (GTE)

MCI Telecommunications Corporation (MCI)

National Data Corporation (NDC)

NYNEX Telephone Companies (NYNEX)

Pacific Bell and Nevada Bell (PacTel)

Southwestern Bell Telephone Company (SWBT)

Tele-Communications Association (TCA)

United States Telephone Association (USTA)

US Sprint Communications Company Limited Partnership (US Sprint)

US West Operating Companies (US West)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies — AAD 91-46

ORDER INVITING COMMENTS

Adopted: August 23, 1991; Released: September 4, 1991

By the Deputy Bureau Chief, Operations, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. This Order Inviting Comments (OIC) proposes to automate twelve Form M schedules by incorporating them into the USOA Report (FCC Report 43-02) of the Automated Reporting Management Information System (ARMIS). In the process of automating these schedules, we propose to modify the data we collect on them (1) by requiring additional information on affiliate transactions; (2) by including in the body of statistical tables data currently reported in footnotes; and (3) by clarifying some of our data requirement elements. We intend to incorporate these schedules and changes into the USOA Report in time for the carriers' 1991 annual submissions, scheduled to be filed on April 1, 1992. If our proposal to automate the twelve Form M schedules is adopted, carriers that file both Form M and ARMIS reports would be able to file a paper USOA Report in lieu of the corresponding Form M schedules to avoid duplicative reporting.

2. ARMIS is an automated system for collecting the financial and operating data required by the Commission to administer its accounting, joint cost, jurisdictional separations, rate base, and access charge rules. ARMIS, which consists of nine automated reports,[1] is filed by Tier 1 carriers.[2] The USOA Report, which is one of the nine ARMIS Reports, is filed annually and contains the end of the year balances for each account prescribed in the Uniform System of Accounts (USOA).[3]

3. Form M, which is required under Part 43 of the Commission's Rules, is filed in paper form on an annual basis by telephone companies operating telephone exchanges and having operating revenues in excess of $100 million. It is comprised of 45 schedules which contain financial, corporate, and statistical data.

4. When the Commission established ARMIS in 1987, it incorporated the most important Form M schedules, the balance sheet and income statement, into the automated system. The Commission also directed the Common Carrier Bureau to (1) review the Form M to determine which schedules were no longer necessary, which schedules needed revision, and which new schedules must be added to satisfy our data collection needs, and (2) to assess which schedules must be mechanized and to incorporate them into the automated reporting system.[4] In line with our original plan, we have completed a further review of the Form M schedules, and we recommend that twelve additional schedules be incorporated into ARMIS.

II. DISCUSSION

5. The twelve Form M schedules[5] selected for incorporation into the ARMIS USOA Report contain information pertaining to the statement of cash flows, investments in affiliated companies, transactions between affiliates, deferred income taxes, pension cost and other statistical data. We are proposing to incorporate these schedules in ARMIS because of the benefits that will result from automation. Automation will facilitate timely and efficient analysis of the data collected on these schedules. We currently receive all the data on these schedules in paper form and must manually check the accuracy of the information. If we wish to perform computer assisted analysis of the information, we have to manually enter the numbers into the computer. This is a time consuming process which delays our use of the data and our ability to publish it promptly. Receiving information on a diskette allows us to perform a computer assisted edit check of the data. Automation will allow us to accumulate, check and analyze the data we collect in the most effective and efficient manner and thus save the Commission time and resources.

6. We are proposing to modify the data we collect regarding the purchases and sales of assets and services between a reporting carrier and its affiliates to improve our ability to monitor these transactions. The Commis-

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[1] The nine ARMIS Reports are: the Quarterly Report (43-01); the USOA Report (43-02); the Joint Cost Report (43-03); the Access Report (43-04); the Forecast Report (495-A); the Actual Usage Report (495-B); the Quarterly Service Quality Report (43-05); the Semi-Annual Service Quality Report (43-06); and the Infrastructure Report (43-07).

[2] Tier 1 carriers are defined as those companies having more than $100 million in total company regulated revenues. Commission Requirements for Cost Support Material to be filed with Access Tariff on March 1, 1985, Public Notice, Mimeo No. 2133, released January 25, 1985.

[3] 47 C.F.R. Part 32.

[4] Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules) CC Docket No. 86-182, 2 FCC Rcd 5770 (1987), *modified on recon.*, 3 FCC Rcd 6375 (1988) (released October 14, 1988).

[5] The specific Form M schedules we intend to include in ARMIS USOA Report are: B-2, Statement of Cash Flows; B-3a, Investments in Affiliated Companies; B-3b, Investments in Affiliated Companies - Cost Method and Nonaffiliated Companies; B-3c, Analysis of Assets Purchased from or Sold to Affiliates; B-11, Net Deferred Operating Income Taxes; B-12, Net Deferred Nonoperating Income Taxes; I-3, General Services and Licenses; I-4, Pension Cost; S-1, Outside Plant Statistics; S-2, Switched Access Lines in Service by Technology; S-3, Access Lines in Service by Customer; and S-4, Telephone Calls.

sion's Joint Cost Order[6] established rules for recording the transfer of assets and the provision of services between carriers and their affiliates.[7] Although the Commission currently receives information on affiliate transactions on Form M Schedules I-3, General Services and Licenses, and B-3c, Analysis of Assets Purchased from or Sold to Affiliates, we tentatively conclude that these schedules do not provide sufficient information to properly monitor these transactions.

7. Schedule I-3 provides a listing of some of the services provided by affiliates to the carrier along with the amount paid for each type of service.[8] Schedule I-3, however, does not cover all services provided by affiliates to the reporting company; does not provide any information on services sold by a carrier to its affiliates; and does not provide information on whether the prices of services are based on tariffed rates, prevailing prices or fully distributed costs. We tentatively conclude that this additional information is needed to monitor affiliate service transactions. Accordingly, in the process of automating Schedule I-3, we are proposing to modify its requirements to provide this additional information.

8. Schedule B-3c provides data on the sales and purchases of assets between the reporting carrier and its affiliates. Schedule B-3c, however, does not indicate if transactions involve tariffed rates or prevailing prices and does not break total sales or purchases down to indicate those recorded at cost, those recorded at fair market value, and those recorded at tariffed rates or prevailing prices. We tentatively conclude that this additional information is needed to monitor affiliate asset transactions. Accordingly, we are proposing to modify Schedule B-3c to obtain this additional information. At the same time, we propose to delete account number and accumulated depreciation information currently reported on Schedule B-3c because we believe that information is no longer needed.

9. In addition, we propose to modify some of the statistical data we collect on Schedules S-2, Switched Access Lines in Service by Technology, and S-3, Access Lines in Service by Customer. Currently, Schedule S-2 requires the carriers to footnote other types of access lines that are not separately reported in the schedule, and it permits the carriers to lump in one column other types of access lines such as ISDN control channels. This schedule is insufficient because it does not require carriers to report total switched access lines. And after three years of analyzing the data being reported in this schedule, we find that there is still a need to clarify the data being reported. Some of the types of access lines that are presently reported in footnotes have now become significant enough to be reported as column headings, and other types of access lines, such as ISDN, need to be broken down to show the different rates at which they are classified. Accordingly, we propose to modify our reporting requirement elements to (1) group the access lines more in line with the type of technology, such as analog and digital; (2) split ISDN control channels between basic rate and primary rate; (3) show as separate column headings such types of access lines as remote switches and digital centrex extensions; and (4) provide a column for the total switched access lines. In Schedule S-3 the carriers are required to provide in a footnote other types of access lines in service by customer that are not separately provided as columns. This schedule is insufficient because significant types of access lines in service by customer are being reported in footnotes. We propose to modify the reporting requirement elements of this schedule to (1) include digital with multi-line business access lines and (2) show analog and digital special access lines as separate column headings.

10. The twelve schedules we propose for inclusion in the ARMIS USOA Report were selected because there is a continuing need for the data being collected and the information they contain is conducive to automation. These schedules contain quantitative information in a row and column format which is easily adapted to automated reporting. The automation of the Form M statistical schedules will facilitate the compilation and the publication of these data. We plan to continue to evaluate the current Form M with the goal of determining whether more schedules should be mechanized and incorporated in ARMIS. In the process, we will consider eliminating unnecessary schedules, consolidate and revise schedules when needed, and add new schedules if they are vital for our information needs.

11. By this Order, we request comment from interested persons regarding our proposed revisions which are detailed in the attached Appendix. Specifically, we invite comments on (1) the proposed tables, particularly with respect to the format for the reporting of data; and (2) the proposed instructions to each of the tables, including the definitions to the statistical tables. We also seek comment on suggestions for other Form M schedules which may lend themselves for inclusion in the ARMIS reporting system. To avoid duplicative reporting for carriers that file both Form M and ARMIS reports, carriers would be able to file a paper USOA Report in lieu of the corresponding Form M schedules.

12. The first page of the attached Appendix includes a summary of the proposed new USOA Report tables. These tables are derived from existing Form M schedules. We have included our modified reporting requirements for affiliate transactions in Tables V and VI and our modified statistical reporting requirements in Tables X and XI. This Appendix also displays a detailed illustration of the new USOA Report tables with accompanying row and column instructions.

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[6] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC 6701 (1988), *aff'd sub nom.* Southestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

[7] 47 C.F.R. §32.27.

[8] Schedule I-3 contains a listing of affiliates to whom respondents paid $100,000 or more for services received under a license agreement, a general service contract, or other arrangement providing for the furnishing of general accounting, engineering, financial, legal, patent, and other general services.

III. OTHER MATTERS

13. Copies of the Appendix to this OIC may be purchased from the Commission's copy contractor for records duplication, Downtown Copy Center, (202) 452-1422, 1114 21st Street, N.W., Washington, D.C. 20036. The Appendix is also available for public inspection and copying during normal business hours in the public reference room of the Commission's Accounting and Audits Division, 2000 L Street, N.W., Room 812, Washington, D.C. Implementation of the modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act of 1980.

IV. PLEADING CYCLE

14. Interested parties may submit comments on the proposed revisions to ARMIS USOA Report (FCC Report 43-02) by October 4, 1991. Replies must be filed by October 21, 1991.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), and Section 0.291(b)(4) (1989), that comment IS INVITED regarding the proposed revisions to FCC USOA Report No. 43-02 as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Bureau Chief, Operations
Common Carrier Bureau

APPENDIX

SUMMARY OF NEW ARMIS 43-02 TABLES

1. Table III, Statement of Cash Flows, is derived from Form M Schedule B-2. The data elements required in this table are unchanged.

2. Table IV, Investments in Other Companies, combines Form M Schedules B-3a and B-3b. The data elements required in this table are unchanged.

3. Table V, Analysis of Assets Purchased from or Sold to Affiliates, is derived from Form M Schedule B-3c. Carriers are no longer required to enter the account number associated with the assets purchased or sold. They are also no longer required to enter the accumulated depreciation associated with these assets. Additional data elements required in this table are: (1) the amount of assets purchased from or sold to affiliates under tariff; (2) the amount of assets purchased from or sold to affiliates at fair market value; and, (3) the amount of assets purchased from or sold to affiliates at the prevailing market price.

4. Table VI, Analysis of Services Purchased from or Sold to Affiliates, is derived from Form M Schedule I-3. Carriers are no longer required to enter the service provided by its affiliates. Additional data elements required in this table are: (1) the amount of services purchased from or sold to affiliates under tariff; (2) the amount of services purchased from or sold to affiliates at fair market value; and, (3) the amount of services purchased from or sold to affiliates at the prevailing market price.

5. Table VII, Net Deferred Income Taxes, combines Form M Schedules B-11 and B-12. The data elements required in this table are unchanged.

6. Table VIII, Pension Cost, is derived from Form M Schedule I-4. The data elements required in this table are unchanged.

7. Table IX, Outside Plant Statistics, is derived from Form M Schedule S-1. An additional data element required in this table is Kilometers of Copper Wire in Cable.

8. Table X, Switched Access Lines in Service by Technology, is derived from Form M Schedule S-2. Additional data elements required in this table are: (1) total switched access lines, and (2) number of central office switches excluding remotes. Digital Centrex extensions and remote switches, previously reported in footnotes, are proposed to be reported in the body of the table.

9. Table XI, Access Lines in Service by Customer, is derived from Form M Schedule S-3. An additional data element required for this table is Total Switched Access Lines. Analog and Digital Special Access Lines, previously reported in footnotes, are proposed to be reported in the body of the table.

10. Table XII, Telephone Calls, is derived from Form M Schedule S-4. The data elements required in this table are unchanged.

TABLE III - STATEMENT OF CASH FLOWS

Row No.	Description (a)	Amount (b)	Amount (c)
	INCREASE/DECREASE IN CASH AND CASH EQUIVALENTS:		
	Cash Flows From Operating Activities:		
8000	Net Income/Loss	N/A	
	Adjustments to Reconcile Net Income to Net Cash Provided by Operating Activities:		
8010	Depreciation and Amortization		N/A
8020	Provision for Losses for Accounts Receivables		N/A
8030	Deferred Income Taxes - Net		N/A
8040	Unamortized ITC - Net		N/A
8050	Allowance for Funds Used During Construction		N/A
8060	Net Change in Operating Receivables		N/A
8070	Net Change in Materials, Supplies & Inventories		N/A
8080	Net Change in Operating Payables & Accrued Liabilities		N/A
8090	Net Change in Other Assets and Deferred Charges		N/A
8100	Net Change in Other Liabilities and Deferred Credits		N/A
8110	Other		N/A
8120	Total Adjustments	N/A	
8130	Net Cash Provided by/Used in Operating Activities	N/A	
	Cash Inflows/Outflows from Investing Activities:		
8140	Construction/Acquisition of Property, Plant and Equipment		N/A
8150	Proceeds from Disposals of Property, Plant and Equipment		N/A
8160	Investments in & Advances to Affiliates		N/A
8170	Proceeds from Repayment of Advances		N/A
8180	Other Investing Activities		N/A
8190	Net Cash Provided by/Used in Investment Activities	N/A	

TABLE III - STATEMENT OF CASH FLOWS

Row No.	Description (a)	Amount (b)	Amount (c)
	Cash Flows from Financing Activities:		
8200	Net Increase/Decrease in Short-Term Debt		N/A
8210	Advances from Affiliates		N/A
8220	Repayment of Advances from Affiliates		N/A
8230	Proceeds from Long-Term Debt		N/A
8240	Repayment of Long-Term Debt		N/A
8250	Payment of Capital Lease Obligations		N/A
8260	Proceeds from Issue of Common/Equity Investment from Parent		N/A
8270	Repurchase of Treasury Shares		N/A
8280	Dividends Paid		N/A
8290	Other Financing Activities		N/A
8300	Net Cash Provided by Financing Activities	N/A	
8310	Effect of Exchange Rate Changes on Cash	N/A	
8320	Net Increase/Decrease in Cash and Cash Equivalents	N/A	
8330	Cash & Cash Equivalents-Beginning of Period	N/A	
8340	Cash & Cash Equivalents-End of Period	N/A	

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1401/1402 Common (b)	Preferred (c)	Advances (d)	LT Debt (e)	Adjustments (f)	Net (g)
	AFFILIATED COMPANIES						
	Equity Method:						
8350							
8351							
8352							
8353							
8354							
8355							
8356							
8357							
8358							
8359							
8360							
8361							
8362							
8363							
8364							
8365							
8366							
8367							
8368							
8369							
8370							
8371							
8372							
8373							
8374							
8375							
8376							
8377							
8378							
8379	All Others						
8380	Total-Equity Methd						

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1401/1402 Common (b)	Preferred (c)	Advances (d)	LT Debt (e)	Adjustments (f)	Net (g)
	AFFILIATED COMPANIES						
	Cost Method:						
8390							
8391							
8392							
8393							
8394							
8395							
8396							
8397							
8398							
8399							
8400							
8401							
8402							
8403							
8404							
8405							
8406							
8407							
8408							
8409							
8410							
8411							
8412							
8413							
8414							
8415							
8416							
8417							
8418							
8419	All Others						
8420	Total-Cost Method						
8430	Total Affiliates						
8440	Non-Affiliates						
8450	Total Investment						

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1160 Beg Balance (h)	Gross Dr (i)	Gross Cr (j)	Net (k)	Account 1180 Beg Balance (l)	Gross Dr (m)	Gross Cr (n)	Net (o)
AFFILIATED COMPANIES									
Equity Method:									
8350									
8351									
8352									
8353									
8354									
8355									
8356									
8357									
8358									
8359									
8360									
8361									
8362									
8363									
8364									
8365									
8366									
8367									
8368									
8369									
8370									
8371									
8372									
8373									
8374									
8375									
8376									
8377									
8379	All Others								
8380	Total-Equity Methd								

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ARMIS USOA REPORT

3060-xxxx

Expires xx/xx/xx

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxxxxxx VERSION

STUDY AREA: xxxxxxxxxxxxxxxxxxxx

SUBMISSION x

PERIOD: From mmmm yyyy To mmmm yyyy

TABLE IV

COSA: xxxx

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1160 Beg Balance (h)	Gross Dr (i)	Gross Cr (j)	Net (k)	Account 1180 Beg Balance (l)	Gross Dr (m)	Gross Cr (n)	Net (o)
	AFFILIATED COMPANIES								
	Cost Method:								
8390									
8391									
8392									
8393									
8394									
8395									
8396									
8397									
8398									
8399									
8400									
8401									
8402									
8403									
8404									
8405									
8406									
8407									
8408									
8409									
8410									
8411									
8412									
8413									
8414									
8415									
8416									
8417									
8418									
8419	All Others								
8420	Total-Cost Method								
8430	Total Affiliates								
8440	Non-Affiliates								
8450	Total Investment								

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1190 Beg Balance (p)	Gross Dr (q)	Gross Cr (r)	Net (s)	Account 1200 Beg Balance (t)	Gross Dr (u)	Gross Cr (v)	Net (w)
	AFFILIATED COMPANIES								
	Equity Method:								
8350									
8351									
8352									
8353									
8354									
8355									
8356									
8357									
8358									
8359									
8360									
8361									
8362									
8363									
8364									
8365									
8366									
8367									
8368									
8369									
8370									
8371									
8372									
8373									
8374									
8375									
8376									
8377									
8379	All Others								
8380	Total-Equity Methd								

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1190 Beg Balance (p)	Gross Dr (q)	Gross Cr (r)	Net (s)	Account 1200 Beg Balance (t)	Gross Dr (u)	Gross Cr (v)	Net (w)
	AFFILIATED COMPANIES								
	Cost Method:								
8390									
8391									
8392									
8393									
8394									
8395									
8396									
8397									
8398									
8399									
8400									
8401									
8402									
8403									
8404									
8405									
8406									
8407									
8408									
8409									
8410									
8411									
8412									
8413									
8414									
8415									
8416									
8417									
8418									
8419	All Others								
8420	Total-Cost Method								
8430	Total Affiliates								
8440	Non-Affiliates								
8450	Total Investment								

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1210 Beg Balance (x)	Gross Dr (y)	Gross Cr (z)	Net (aa)	Total (ab)
	AFFILIATED COMPANIES					
	Equity Method:					
8350						
8351						
8352						
8353						
8354						
8355						
8356						
8357						
8358						
8359						
8360						
8361						
8362						
8363						
8364						
8365						
8366						
8367						
8368						
8369						
8370						
8371						
8372						
8373						
8374						
8375						
8376						
8377						
8379	All Other					
8380	Total-Equity Methd					

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

TABLE IV - INVESTMENTS IN OTHER COMPANIES

Row No.	Company Name (a)	Account 1210 Beg Balance (x)	Gross Dr (y)	Gross Cr (z)	Net (aa)	Total (ab)
	AFFILIATED COMPANIES					
	Cost Method:					
8390						
8391						
8392						
8393						
8394						
8395						
8396						
8397						
8398						
8399						
8400						
8401						
8402						
8403						
8404						
8405						
8406						
8407						
8408						
8409						
8410						
8411						
8412						
8413						
8414						
8415						
8416						
8417						
8418						
8419	All Other					
8420	Total-Cost Method					
8430	Total Affiliates					
8440	Non-Affiliates					
8450	Total Investment					

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSI
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE V.A
COSA: xxxx

TABLE V.A - ANALYSIS OF ASSETS PURCHASED FROM OR SOLD TO AFFILIATES

Row No.	Name of Affiliate (a)	Cost (b)	Fair Market Value (c)	Tariff (d)	Prevailing Market Price (e)	Total Purchases (f)
	PURCHASES FROM AFFILIATES:					
8460						
8461						
8462						
8463						
8464						
8465						
8466						
8467						
8468						
8469						
8470						
8471						
8472						
8473						
8474						
8475						
8476						
8477						
8478						
8479						
8480						
8481						
8482						
8483						
8484						
8485						
8486						
8487						
8488						
8489						
8490						
8491						
8492						
8493						
8494						
8495						
8496						
8497						
8498						
8499	Purchases From All Other Affiliates					
8500	Total Purchases					

TABLE V.B - ANALYSIS OF ASSETS PURCHASED FROM OR SOLD TO AFFILIATES

Row No.	Name of Affiliate (a)	Cost (b)	Fair Market Value (c)	Tariff (d)	Prevailing Market Price (e)	Total Sales (f)
	SALES TO AFFILIATES:					
8510						
8511						
8512						
8513						
8514						
8515						
8516						
8517						
8518						
8519						
8520						
8521						
8522						
8523						
8524						
8525						
8526						
8527						
8528						
8529						
8530						
8531						
8532						
8533						
8534						
8535						
8536						
8537						
8538						
8539						
8540						
8541						
8542						
8543						
8544						
8555						
8556						
8557						
8558						
8859	Sales to All Other Affiliates					
8560	Total Sales					

TABLE VI.A - ANALYSIS OF SERVICES PURCHASED FROM OR SOLD TO AFFILIATES

Row No.	Name of Affiliate (a)	Cost (b)	Tariff Rate (c)	Prevailing Market Price (d)	Total Purchases (e)
PURCHASES FROM AFFILIATES:					
8570					
8571					
8572					
8573					
8574					
8575					
8576					
8577					
8578					
8579					
8580					
8581					
8582					
8583					
8584					
8585					
8586					
8587					
8588					
8589					
8590					
8591					
8592					
8593					
8594					
8595					
8596					
8597					
8598					
8599					
8600					
8601					
8602					
8603					
8604					
8605					
8606					
8607					
8608					
8609					
8610	Total Purchases				

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ARMIS USOA REPORT 3060-xxxx

Expires xx/xx/xx

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION

STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION x

PERIOD: From mmmm yyyy To mmmm yyyy TABLE VI.B

COSA: xxxx

TABLE VI.B - ANALYSIS OF SERVICES PURCHASED FROM OR SOLD TO AFFILIATES

Row No.	Name of Affiliate (a)	Cost (b)	Tariff Rate (c)	Prevailing Market Price (d)	Total Sales (e)
	SALES TO AFFILIATES:				
8620					
8621					
8622					
8623					
8624					
8625					
8626					
8627					
8628					
8629					
8630					
8631					
8632					
8633					
8634					
8635					
8636					
8637					
8638					
8639					
8640					
8641					
8642					
8643					
8644					
8645					
8646					
8647					
8748					
8649					
8650					
8651					
8652					
8653					
8654					
8655					
8656					
8657					
8658					
8659	Sales to All Other Affiliates				
8660	Total Sales				

TABLE VII - NET DEFERRED INCOME TAXES

Row No.	Particulars (a)	Beg Balance (b)	Account (c)	Current Yr Accrual (d)	Current Yr Amortize (e)	Adjustments Debit (f)	Adjustments Credit (g)	End of Year Balance (h)
	NET DEFERRED OPERATING INCOME TAXES - ACCOUNTS 4100 AND 4340:							
	Property Related:							
	Net Current Deferred Operating Income Taxes (Account 4100)							
	Provision for Deferred Operating Income Taxes - Net							
8670	Federal Income Taxes							
8671	State and Local Income Taxes							
8672	Total Net Current Op Inc Taxes							
	Net Noncurrent Deferred Operating Income Taxes (Account 4340)							
	Provision for Deferred Operating Income Taxes - Net							
8680	Federal Income Taxes							
8681	State and Local Income Taxes							
8682	Total Net Noncurr Op Inc Taxes							
8690	Tot Prop Rel Def Op Inc Taxes							
	Nonproperty Related:							
	Net Current Deferred Operating Income Taxes (Account 4100)							
	Provision for Deferred Operating Income Taxes - Net							
8700	Federal Income Taxes							
8701	State and Local Income Taxes							
8702	Total Net Current Op Inc Taxes							
	Net Noncurrent Deferred Operating Income Taxes (Account 4340)							
	Provision for Deferred Operating Income Taxes - Net							
8710	Federal Income Taxes							
8711	State and Local Income Taxes							
8712	Total Net Noncurr Op Inc Taxes							
8720	Tot Nonprop Rel Def Op Inc Tax							

TABLE VII - NET DEFERRED INCOME TAXES

Row No.	Particulars (a)	Beg Balance (b)	Account (c)	Current Yr Accrual (d)	Current Yr Amortize (e)	Adjustments Debit (f)	Adjustments Credit (g)	End of Year Balance (h)
	NET DEFERRED NONOPERATING INCOME TAXES - ACCOUNTS 4110 AND 4350:							
	Property Related:							
	Net Current Deferred Nonoperating Income Taxes (Account 4110)							
	Provision for Deferred Nonoperating Income Taxes - Net							
8730	Federal Income Taxes							
8731	State and Local Income Taxes							
	Deferred Income Tax Effect of Extraordinary Items - Net							
8740	Federal Income Taxes							
8741	State and Local Income Taxes							
8750	Tot Net Current Nonop Inc Txs							
	Net Noncurrent Deferred Nonoperating Income Taxes (Account 4350)							
	Provision for Deferred Nonoperating Income Taxes - Net							
8760	Federal Income Taxes							
8761	State and Local Income Taxes							
	Deferred Income Tax Effect of Extraordinary Items - Net							
8770	Federal Income Taxes							
8771	State and Local Income Taxes							
8780	Total Net NonCurr Nonop Inc Tx							
8790	Tot Prop Rel Def Nonop Inc Txs							

TABLE VII - NET DEFERRED INCOME TAXES

Row No.	Particulars (a)	Beg Balance (b)	Account (c)	Current Yr Accrual (d)	Current Yr Amortize (e)	Adjustments Debit (f)	Adjustments Credit (g)	End of Year Balance (h)
	NET DEFERRED NONOPERATING INCOME TAXES - ACCOUNTS 4110 AND 4350 (cont):							
	Nonproperty Related:							
	Net Current Deferred Nonoperating Income Taxes (Account 4110)							
	Provision for Deferred Nonoperating Income Taxes - Net							
8800	Federal Income Taxes							
8801	State and Local Income Taxes							
	Deferred Income Tax Effect of Extraordinary Items - Net							
8810	Federal Income Taxes							
8811	State and Local Income Taxes							
8820	Tot Net Current Nonop Inc Txs							
	Net Noncurrent Deferred Nonoperating Income Taxes (Account 4350)							
	Provision for Deferred Nonoperating Income Taxes - Net							
8830	Federal Income Taxes							
8831	State and Local Income Taxes							
	Deferred Income Tax Effect of Extraordinary Items - Net							
8840	Federal Income Taxes							
8841	State and Local Income Taxes							
8850	Tot Net Noncurr Nonop Inc Txs							
8860	Tot Nonpro Rel Def Nonop In Tx							

TABLE VIII - PENSION COST

Row No.	Description (a)	Amount Current Year (b)	Amount Previous Year (c)
	MANAGEMENT PLAN DATA:		
8870	Accumulated Benefit Obligation		
8871	Projected Benefit Obligation		
8872	Fair Value of Plan Assets		
8873	Discount Rate for Settlement of Liabilities		
8874	Expected Long Term Return on Assets		
	Net Periodic Pension Cost:		
8880	Service Cost		
8881	Interest Cost		
8882	Return on Plan Assets		
8883	Amortization of Transition Amount		
8884	Amortization of Gains or Losses		
8885	Total		
8890	Number of Active Employees		
8891	Number of Retired Employees		
	REPORTING COMPANY:		
9000	Minimum Required Contribution		
9001	Actual Contribution		
9002	Maximum Amount Deductible		
9003	Benefit Payments		
9010	Pension Cost		
9011	Pension Cost Capitalized		
9012	Accumulated Pension Asset/Liability-End of Yr		
9020	Number of Active Employees		
9021	Number of Retired Employees		

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TABLE VIII - PENSION COST

Row No.	Description (a)	Amount Current Year (b)	Amount Previous Year (c)
	NON-MANAGEMENT PLAN DATA:		
9030	Accumulated Benefit Obligation		
9031	Projected Benefit Obligation		
9032	Fair Value of Plan Assets		
9033	Discount Rate for Settlement of Liabilities		
9034	Expected Long Term Return on Assets		
	Net Periodic Pension Cost:		
9040	Service Cost		
9041	Interest Cost		
9042	Return on Plan Assets		
9043	Amortization of Transition Amount		
9044	Amortization of Gains or Losses		
9045	Total		
9050	Number of Active Employees		
9051	Number of Retired Employees		
	REPORTING COMPANY:		
9060	Minimum Required Contribution		
9061	Actual Contribution		
9062	Maximum Amount Deductible		
9063	Benefit Payments		
9070	Pension Cost		
9071	Pension Cost Capitalized		
9072	Accumulated Pension Asset/Liability-End of Yr		
9080	Number of Active Employees		
9081	Number of Retired Employees		

TABLE VIII - PENSION COST

Row No.	Description (a)	Amount Current Year (b)	Amount Previous Year (c)
	ALTERNATIVE MANAGEMENT PLAN DATA:		
9090	Accumulated Benefit Obligation		
9091	Projected Benefit Obligation		
9092	Fair Value of Plan Assets		
9093	Discount Rate for Settlement of Liabilities		
9094	Expected Long Term Return on Assets		
	Net Periodic Pension Cost:		
9100	Service Cost		
9101	Interest Cost		
9102	Return on Plan Assets		
9103	Amortization of Transition Amount		
9104	Amortization of Gains or Losses		
9105	Total		
9110	Number of Active Employees		
9111	Number of Retired Employees		
	REPORTING COMPANY:		
9120	Minimum Required Contribution		
9121	Actual Contribution		
9122	Maximum Amount Deductible		
9123	Benefit Payments		
9130	Pension Cost		
9131	Pension Cost Capitalized		
9132	Accumulated Pension Asset/Liability-End of Yr		
9140	Number of Active Employees		
9141	Number of Retired Employees		

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TABLE VIII - PENSION COST

Row No.	Description (a)	Amount Current Year (b)	Amount Previous Year (c)
	ALTERNATIVE NON-MANAGEMENT PLAN DATA:		
9150	Accumulated Benefit Obligation		
9151	Projected Benefit Obligation		
9152	Fair Value of Plan Assets		
9153	Discount Rate for Settlement of Liabilities		
9154	Expected Long Term Return on Assets		
	Net Periodic Pension Cost:		
9160	Service Cost		
9161	Interest Cost		
9162	Return on Plan Assets		
9163	Amortization of Transition Amount		
9164	Amortization of Gains or Losses		
9165	Total		
9170	Number of Active Employees		
9171	Number of Retired Employees		
	REPORTING COMPANY:		
9180	Minimum Required Contribution		
9181	Actual Contribution		
9182	Maximum Amount Deductible		
9183	Benefit Payments		
9190	Pension Cost		
9191	Pension Cost Capitalized		
9192	Accumulated Pension Asset/Liability-End of Yr		
9200	Number of Active Employees		
9201	Number of Retired Employees		

TABLE IX - OUTSIDE PLANT STATISTICS

Row No.	State or Terr (a)	Code (b)	Km of Aerial Wire (c)	Aerial Cable Sheath Km of Copper (d)	Aerial Cable Sheath Km of Fiber (e)	Underground Cable Sheath Km of Copper (f)	Underground Cable Sheath Km of Fiber (g)	Buried Cable Sheath Km of Copper (h)	Buried Cable Sheath Km of Fiber (i)	Submarine Cable Sheath Km of Copper (j)	Submarine Cable Sheath Km of Fiber (k)
00010											
00011											
00012											
00013											
00014											
00015											
00016											
00017											
00018											
00019											
00020											
00021											
00022											
00023											
00024											
00025											
00026											
00027											
00028											
0029											
00030											
0100	Total										

TABLE IX - OUTSIDE PLANT STATISTICS

			Deep Sea Cable		Intrabldg Ntwk Cable		Total Cable		Km of Fiber in Cable	
Row No.	State or Terr (a)	Code (b)	Sheath Km of Copper (l)	Sheath Km of Fiber (m)	Sheath Km of Copper (n)	Sheath Km of Fiber (o)	Sheath Km of Copper (p)	Sheath Km of Fiber (q)	Fiber Km Equipped (Lit) (r)	Total Fiber Km Deployed (Lit & Dark) (s)
0010										
0011										
0012										
0013										
0014										
0015										
0016										
0017										
0018										
0019										
0020										
0021										
0022										
0023										
0024										
0025										
0026										
0027										
0028										
0029										
0030										
0100	Total									

TABLE IX - OUTSIDE PLANT STATISTICS

Row No.	State or Territory (a)	Code (b)	Km of Copper Wire in Cable (t)	Equipped Km of Tube in Coax Cable (u)	Radio Relay System: Km of System (v)	Radio Relay System: Km of Radio Chann (w)	Radio Relay System: Km of Equiv 4Khz & 64Kb/S TelephChannel (x)	Number of Poles (y)
0010								
0011								
0012								
0013								
0014								
0015								
0016								
0017								
0018								
0019								
0020								
0021								
0022								
0023								
0024								
0025								
0026								
0027								
0028								
0029								
0030								
0100	Total							

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TABLE IX - OUTSIDE PLANT STATISTICS

Row No.	State or Territory (a)	Code (b)	Conduit System		Total Equipped Circuit Km (Cable and Microwave Systems)		
			Trench Km (z)	Duct Km (aa)	Analog (4Khz or Equiv) (ab)	Digital (64 Kb/S or Equiv) (ac)	Video (ad)
0010							
0011							
0012							
0013							
0014							
0015							
0016							
0017							
0018							
0019							
0020							
0021							
0022							
0023							
0024							
0025							
0026							
0027							
0028							
0029							
0030							
0100	Total						

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COSA: xxxx

TABLE X - SWITCHED ACCESS LINES IN SERVICE BY TECHNOLOGY

			Analog (4Khz or Equivalent)			Digital (64Kb/Sec or Equivalent)				
Row No.	State or Terr (a)	Code (b)	Main Access Lines (c)	PBX and Centrex Trunks (d)	Centrex Extensions (e)	Main Access Lines (f)	PBX and Centrex Trunks (g)	Centrex Extensions (h)	Other Switched AccessLines (i)	Total Switched AccessLines (j)
0110										
0111										
0112										
0113										
0114										
0115										
0116										
0117										
0118										
0119										
0121										
0122										
0123										
0124										
0125										
0126										
0127										
0128										
0129										
0131										
0190	Total									

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PERIOD: From mmmm yyyy To mmmm yyyy TABLE X

COSA: xxxx

TABLE X - SWITCHED ACCESS LINES IN SERVICE BY TECHNOLOGY

Row No.	State or Terr (a)	Code (b)	Central Office Switches Exc Remotes (k)	Remote Switches (l)	Total Central Office Switches (m)	Basic Rate ISDN Cntrl Channels (n)	PrimaryRate ISDN Cntrl Channels (o)
0110							
0111							
0112							
0113							
0114							
0115							
0116							
0117							
0118							
0119							
0121							
0122							
0123							
0124							
0125							
0126							
0127							
0128							
0129							
0131							
0190	Total						

TABLE XI - ACCESS LINES IN SERVICE BY CUSTOMER

Row No.	State or Terr (a)	Code (b)	Business Access Lines: Analog Single Line (c)	Business Access Lines: Multi Line & Digital (d)	Public Access Lines (e)	Residence Access Lines (f)	Mobile Access Lines (g)	Total Switched Access Lines (h)	Special Access Lines (non-switched): Analog (i)	Special Access Lines (non-switched): Digital (j)	Total Access Lines (Switched & Special) (k)
200											
201											
202											
203											
204											
205											
206											
207											
208											
209											
211											
212											
213											
214											
215											
216											
217											
218											
219											
290	Total										

TABLE XII - TELEPHONE CALLS

Row No.	State or Terr (a)	Code (b)	Local Calls Completed (c)	IntraLATA Toll Calls Completed (d)	InterLATA Toll Calls: Interstate Calls Completed (e)	InterLATA Toll Calls: Interstate Billed Access Min (f)	InterLATA Toll Calls: Intrastate Calls Completed (g)	InterLATA Toll Calls: Intrastate Billed Access Min (h)	Total InterLATA Calls: Calls Completed (i)	Total InterLATA Calls: Billed Access Min (j)
0300										
0301										
0302										
0303										
0304										
0305										
0306										
0307										
0308										
0309										
0310										
0311										
0312										
0313										
0314										
0315										
0316										
0317										
0318										
0319										
0390	Total									

TABLE III - STATEMENT OF CASH FLOWS

GENERAL INSTRUCTIONS

This table displays cash flows from the operating activities of the reporting carrier. All negative numbers should be immediately preceded by a minus (-) sign. All amounts must be rounded to the nearest thousand.

ROW INSTRUCTIONS

ROW

8000. Net Income/Loss - Enter net income for the current reporting period as a positive number. If it is a net loss, enter the amount as a negative number. This amount must equal row 790, Table II.

8010. Depreciation and Amortization - Enter the amount for these accounts for the current reporting period as a positive number. This amount must equal row 6560, Table II.

8020. Provision for Losses for Accounts Receivable - Enter the amount for this account for the current reporting period as a positive number. This amount must equal row 5300, Table II.

8030. Deferred Income Taxes-Net - If the sum of these accounts for the current reporting period is a debit amount, enter that amount as a positive number. If it is a credit amount, enter it as a negative number. The amount must equal the total of rows 7250 and 7450, Table II.

8040. Unamortized Investment Tax Credit-Net - If the amount for this account for the current reporting period is a debit amount, enter that amount as a positive number. If it is a credit amount, enter it as a negative number. The amount must equal row 7210, Table II.

8050. Allowance for Funds Used During Construction - Enter the amount for this account for the current reporting period as a negative number. This amount must equal row 7340, Table II.

8060. Net Change in Operating Receivables - If the sum of the balances of these accounts increased during the current reporting period, enter the change as a negative number. If it decreased, enter the change as a positive number.

8070. Net Change in Materials, Supplies and Inventories - If the balance in these accounts increased for the current reporting period, enter the change as a negative number. If it decreased, enter the change as a positive number.

8080. Net Change in Operating Payables and Accrued Liabilities - If the sum of the balances in these accounts increased during the current reporting period, enter the amount of change as a positive number. If this amount decreases, enter it as a negative number.

8090. Net Change in Other Assets and Deferred Charges - If the sum of the balances in these accounts increased during the current reporting period, enter the amount of the change as a negative number. If that amount decreased, enter the change as a positive number.

8100. Net Change in Other Liabilities and Deferred Credits - If the sum of the balances in these accounts increased during the current reporting period, enter the amount of the change as a positive number. If that amount decreased, enter the change as a negative number.

8110. Other - If the net of all other adjustments resulted in a cash inflow, enter the amount as a positive number. If it resulted in a cash outflow, enter the amount as a negative number.

8120. Total Adjustments - Enter the total of rows 8010 through 8110.

8130. Net Cash Provided by/Used in Operating Activities - Enter the sum of Rows 8000 and 8120.

8140. Construction/Acquisition of Property, Plant and Equipment - Enter the amount used for construction or acquisition of property, plant or equipment, during the current reporting period as a negative number.

8150. Proceeds from Disposal of Property, Plant and Equipment - If the net proceeds received during the current reporting period resulted in a net cash inflow, enter the amount as a positive number. If it resulted in a net cash outflow, enter the amount as a negative number.

8160. Investments in and Advances to Affiliates - Enter investments in and advances to affiliates for the current reporting year as a negative number.

8170. Proceeds from Repayment of Advances - Enter the proceeds received during the the current reporting period as a positive number.

8180. Other Investing Activities - If these activities result in a net cash inflow for the current reporting year, enter the amount as a positive number. If they result in a net cash outflow, enter the amount as a negative number.

8190. Net Cash Provided by/Used in Investing Activities - Enter the sum of rows 8140 through 8180.

8200. Net Increase/Decrease in Short-Term Debt - Enter a net increase in short-term debt, having maturities of less than three months, as a positive number. Enter a net decrease as a negative number.

8210. Advances from Affiliates - Enter the advances received during the current reporting period as a positive number.

8220. Repayment of Advances from Affiliates - Enter advances repaid during the current reporting period as a negative number.

8230. Proceeds from Long-Term Debt - Enter the proceeds received from long-term debt during the current reporting period as a positive number.

8240. Repayment of Long-Term Debt - Enter repayments of long-term debt for the current reporting period as a negative number.

8250. Payment of Capital Lease Obligations - Enter payments of capital lease obligations for the current reporting period as a negative number.

8260. Proceeds from Issuing Common Stock/Equity Investment from Parent - Enter the proceeds received from the issue of stock, or from investment by the parent, during the current reporting period as a positive number.

8270. Repurchase of Treasury Shares - Enter the cost of treasury shares repurchased during the current reporting period as a negative number.

8280. Dividends Paid - Enter the amount of dividends paid during the current reporting period as a negative number.

8290. Other Financing Activities - If these activities for the current reporting period result in a net cash inflow, enter the amount as a positive number. If they result in a net cash outflow, enter the amount as a negative number.

8300. Net Cash Provided by Financing Activities - Enter the total of rows 8200 through 8290.

8310. Effect of Exchange Rate Changes on Cash - Enter the effect (in dollars) of exchange rate changes on cash balances held in foreign currencies. If this amount increased cash, enter it as a positive number. If the amount decreased cash, enter it as a negative number.

8320. Net Increase/Decrease in Cash and Cash Equivalents - Enter the sum of rows 8130, 8190, 8300 and 8310.

8330. Cash and Cash Equivalents at Beginning of Period - Enter the amount of cash and cash equivalents at the beginning of the current reporting period as a positive number.

8340. Cash and Cash Equivalents at End of Period - Enter the sum of rows 8320 and 8330.

COLUMN DESCRIPTIONS

COLUMN

(b) Amount - Enter the amounts for rows 8010 through 8110, 8140 through 8180, and 8200 through 8290 in this column.

(c) Amount - Enter the amounts for rows 8000. 8120, 8130, 8190, 8300, 8310, 8320, 8330 and 8340 in this column.

TABLE IV - INVESTMENTS IN AFFILIATES AND OTHER COMPANIES

GENERAL INSTRUCTIONS

This table displays the amount of carrier investment in affiliated companies accounted for under the "equity method", the amount of carrier investment in affiliated companies under the "cost method", and carrier investment in nonaffiliated companies. All amounts must be rounded to the nearest thousand dollars.

ROW

8350 through 8378. Each of these rows is provided for the entry of data associated with carrier investment in affiliated companies under the "equity method." Use one row for each affiliate, in descending order by volume of investment. If there are no data applicable to a certain field, enter zero in that field.

8379. Enter the total amount of remaining investments, if any, associated with carrier investment in affiliated companies under the "equity method." This row is to be used only if rows 8350 through 8378 do not provide enough space for all of the reporting carrier's investments in affiliates under the "equity method"

8380. Total-Equity Method - The total of rows 8350 through 8379.

8390 through 8418. Each of these rows is provided for the entry of data associated with carrier investment in affiliated companies under the "cost method." Use one row for each affiliate, in descending order by volume of investment. If there are no data applicable to a certain field, enter zero in that field.

8419. Enter the total amount of remaining investments, if any, associated with carrier investment in affiliated companies under the "cost method." This row is to be used only if rows 8390 through 8418 do not provide enough space for all of the reporting carrier's investments in affiliates under the "cost method."

8420. Total-Cost Method - The total of rows 8390 through 8419.

8430. Total Affiliates - The sum of rows 8380 and 8420.

8440. Non-Affiliates - Enter the aggregate amount of investment in non-affiliates.

8450. Total Investment - The sum of rows 8430 and 8440.

COLUMN DESCRIPTIONS

COLUMN

Account 1401 - Investments in Affiliated Companies, as defined in Section 32.1401 of the Commission's Rules.

Account 1402 - Investments in Nonaffiliated Companies, as defined in Section 32.1402 of the Commission's Rules.

(a) Company Name - The name of the company in which the reporting carrier has investments.

(b) Common - This column reflects the end-of-year balance of investment in common stock

(c) Preferred - This column reflects the end-of-year balance of investment in preferred stock.

(d) Advances - This column reflects the end-of-year balance of advances and special deposits of cash for more than one year from the date of deposit.

(e) Long-Term Debt - This column reflects the end-of-year balance of long term debt issued to other companies.

(f) Adjustments - This column reflects adjustments made for undistributed earnings or losses during the reporting period.

(g) Net - The net amount of columns (b) through (f).

Account 1160 - Temporary Investments, as defined in Section 32.1160 of the Commission's Rules.

(h) Beginning Balance - The appropriate portion of the balance of account 1160 at the beginning of the reporting period for each row item.

(i) Gross Debits - The gross amount of debits to account 1160 during the reporting period for each row item.

(j) Gross Credits - The gross amount of credits to account 1160 during the reporting period for each row item.

(k) Net - Column (h) plus column (i) less column (j).

Account 1180 - Telecommunications Accounts Receivable, as defined in Section 32.1180 of the Commission's Rules.

(l) Beginning Balance - The appropriate portion of the balance of account 1180 at the beginning of the reporting period for each row item.

(m) Gross Debits - The gross amount of debits to account 1180 during the reporting period for each row item.

(n) Gross Credits - The gross amount of credits to account 1180 during the reporting period for each row item.

(o) Net - Column (l) plus column (m) less column (n).

Account 1190 - Other Accounts Receivable, as defined in Section 32.1190 of the Commission's Rules.

(p) Beginning Balance - The appropriate portion of the balance of account 1190 at the beginning of the reporting period for each row item.

(q) Gross Debits - The gross amount of debits to account 1190 during the reporting period for each row item.

(r) Gross Credits - The gross amount of credits to account 1190 during the reporting period for each row item.

(s) Net - Column (p) plus column (q) less column (r).

Account 1200 - Notes receivable, as defined in Section 32.1200 of the Commission's Rules.

(t) Beginning Balance - The appropriate portion of the balance of account 1200 at the beginning of the reporting period for each row item.

(u) Gross Debits - The gross amount of debits to account 1200 during the reporting period for each row item.

(v) Gross Credits - The gross amount of credits to account 1200 during the reporting period for each row item.

(w) Net - Column (t) plus column (u) less column (v).

Account 1210 - Notes receivable allowance, as defined in Section 32.1210 of the Commission's Rules.

(x) Beginning Balance - The appropriate portion of the balance of account 1210 at the beginning of the reporting period for each row item.

(y) Gross Debits - The gross amount of debits to account 1210 during the reporting period for each row item.

(z) Gross Credits - The gross amount of credits to account 1210 during the reporting period for each row item.

(aa) Net - Column (x) plus column (y) less column (z).

(bb) Total - The sum of columns (g), (k), (o), (s), (w) and (aa).

TABLE V - ANALYSIS OF ASSETS PURCHASED FROM OR SOLD TO AFFILIATES

GENERAL INSTRUCTIONS

This table displays data regarding the purchase of assets from, and the sale of assets to, affiliates. All dollar amounts must be rounded to the nearest thousand dollars.

ROW INSTRUCTIONS

ROW	
8460 through 8498.	Each of these rows is provided for the entry of data associated with the purchase of assets from affiliates. Use one row for each affiliate, in descending order of the amount of purchases from each affiliate. If there are no data applicable to a certain field, enter zero in that field.
8499.	Purchases From All Other Affiliates - Enter the total amount of remaining purchases, if any, from affiliates in this row. This row is to be used only if rows 8460 through 8498 do not provide enough space for all of the reporting carrier's affiliates from whom purchases were made during the reporting period.
8500.	Total Purchases - The total of rows 8460 through 8499.
8510 through 8558.	Each of these rows is provided for the entry of data associated with the sale of assets to affiliates. Use one row for each affiliate, in descending order of the amount of sales to each affiliate. If there are no data applicable to a certain field, enter zero in that field.
8559.	Sales To All Other Affiliates - Enter the total amount of remaining sales, if any, from affiliates in this row. This row is to be used only if rows 8510 through 8558 do not provide enough space for all of the reporting carrier's affiliates from whom purchases were made during the reporting period.
8560.	Total Sales - The total of rows 8510 through 8559.

COLUMN DESCRIPTIONS

TABLE V.A

COLUMN	
(a)	Name of Affiliate - Enter the names of the affiliates from whom assets were purchased in rows 8460 through 8498.
(b)	Cost - Enter the amount of assets purchased from affiliates at cost, pursuant to Sections 32.27(b) and (c).
(c)	Fair Market Value - Enter the amount of assets purchased from affiliates at fair market value, pursuant to Sections 32.27(b) and (c).
(d)	Tariff - Enter the amount of assets purchased from affiliates under tariffed rates, pursuant to Section 32.27(c).
(e)	Prevailing Market Price - Enter the amount of assets purchased from affiliates at the prevailing market price, pursuant to Sections 32.27(b) and (c).
(f)	Total Purchases - Enter the total of columns (b), (c), (d), and (e).

TABLE V.B

COLUMN	
(a)	Name of Affiliate - Enter the names of the affiliates to whom assets were sold in rows 8410 through 8558.
(b)	Cost - Enter the amount of assets sold to affiliates at cost, pursuant to Sections 32.27(b) and (c).
(c)	Fair Market Value - Enter the amount of assets sold to affiliates at fair market value, pursuant to Sections 32.27(b) and (c).
(d)	Tariff - Enter the amount of assets sold to affiliates under tariffed rates, pursuant to Section 32.27(c).

(e) Prevailing Market Price - Enter the amount of assets sold to affiliates at the prevailing market price, pursuant to Sections 32.27(b) and (c).

(f) Total Sales - Enter the total of columns (b), (c), (d), and (e).

TABLE VI - ANALYSIS OF SERVICES PURCHASED FROM OR SOLD TO AFFILIATES

This table displays data regarding the purchase of services from, and the sale of services to affiliates. All dollar amount must be rounded to the nearest thousand.

ROW INSTRUCTIONS

ROW	
8570 through 8608.	Each of these rows is provided for entry of data associated with the purchase of services from regulated affiliates. Use one row for each affiliate, in descending order of the amount of purchase from each affiliate. If there are no data applicable to a certain field, enter zero in that field.
8609.	Purchases From All Other Affiliates - Enter the total amount of remaining purchases, if any, from affiliates in this row. This row is to be used only if rows 8570 through 8608 do not provide enough space for all of the reporting carrier's affiliates from whom purchases were made during the reporting period.
8610.	Total Purchases - The total of rows 8570 through 8609.
8620 through 8658.	Each of these rows is provided for entry of data associated with the sale of services to affiliates. Use one row for each affiliate, in descending order of the amount of sales to each affiliate. If there are no data applicable to a certain field, enter zero in that field.
8659.	Sales to All Other Affiliates - Enter the total amount of remaining sales, if any, to affiliates in this row. This row is to be used only if rows 8620 through 8658 do not provide enough space for all of the reporting carrier's affiliates to whom sales were made.
8660.	Total Sales - The total of rows 8620 through 8659.

COLUMN DESCRIPTIONS

TABLE VI.A

COLUMN	
(a)	Name of Affiliate - Enter the name of the affiliates from whom services were purchased in rows 8570 through 8608.
(b)	Cost - Enter the amount of services purchased from affiliates at cost, pursuant to Section 32.27(d).
(c)	Tariff Rate - Enter the amount of services purchased from affiliates under tariffed rates, pursuant to 32.27(d).
(d)	Prevailing Market Price - Enter the amount of services purchased at the prevailing market price, pursuant to 32.27(d).
(e)	Total Purchases - The total of columns (b), (c), and (d).

TABLE VI.B

(a)	Name of Affiliate - Enter the name of the affiliates to whom services were sold in rows 8620 through 8658.
(b)	Cost - Enter the amount of services sold to affiliates at cost, pursuant to Section 32.27(d).
(c)	Tariff Rate - Enter the amount of services sold to affiliates under tariffed rates, pursuant to Section 32.27(d).
(d)	Prevailing Market Price - Enter the amount of services sold to affiliates at the prevailing market price, pursuant to Section 32.27(d).
(e)	Total Sales - The total of columns (b), (c), and (d).

TABLE VII - NET DEFERRED INCOME TAXES

GENERAL INSTRUCTIONS

This table displays data regarding net deferred operating income taxes and net deferred nonoperating income taxes in accounts 4100, 4340, 4110 and 4350. All dollar amounts must be rounded to the nearest thousand.

ROW INSTRUCTIONS

ROW

Property Related - This amount is maintained in subsidiary record categories of the books of account so that it may be identified apart from nonproperty related amounts, pursuant to Sections 32.4100(e), 32.4110(h), 32.4340(e) and 32.4350(h) of the Commission's Rules.

Account 4100 - Net current deferred operating income taxes, as defined in Section 32.4100 of the Commission's Rules.

8670. Federal Income Taxes - The amount of property-related, operating federal income tax expense related to current items from regulated operations which have been deferred to later periods as a result of the normalized method of accounting for tax differentials authorized by the Commission and not provided for elsewhere.

8671. State and Local Income Taxes - The amount of property-related, operating state and local income tax expense related to current items from regulated operations which have been deferred to later periods as a result of the normalized method of accounting for tax differentials authorized by the Commission and not provided for elsewhere.

8672. Total Net Current Deferred Operating Income Taxes - The total of rows 8670 and 8671.

Account 4340 - Net noncurrent deferred operating income taxes, as defined in Section 32.4340 of the Commission's Rules.

8680. Federal Income Taxes - The amount of property-related, federal income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a result of comprehensive interperiod tax allocation relating to timing differences that arise from regulated operations.

8681. State and Local Income Taxes - The amount of property-related, state and local income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a result of comprehensive interperiod tax allocation relating to timing differences that arise from regulated operations.

8682. Total Net Noncurrent Deferred Operating Income Taxes - The total of rows 8680 and 8681.

6890. Total Property Related Deferred Operating Income Taxes - The total of rows 8672 and 8682.

Nonproperty Related - This amount is maintained in subsidiary record categories of the books of account so that it may be identified apart from property related amounts, pursuant to Sections 32.4100(e) and 32.4340(e) of the Commission's Rules.

8700. Federal Income Taxes - The amount of nonproperty-related federal income tax expense related to current items from regulated operations which have been deferred to later periods as a result of the normalized method of accounting for tax differentials authorized by the Commission and not provided for elsewhere.

8701. State and Local Income Taxes - The amount of nonproperty-related state and local income tax expense related to current items from regulated operations which have been deferred to later periods as a result of the normalized method of accounting for tax differentials authorized by the Commission and not provided for elsewhere.

8702. Total Net Current Deferred Operating Income Taxes - The total of rows 8700 and 8701.

8710. Federal Income Taxes - The amount of nonproperty-related federal income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a result of comprehensive interperiod tax allocation related to timing differences that arise from regulated operations.

8711. State and Local Income Taxes - The amount of nonproperty-related state and local income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a result of comprehensive interperiod tax allocation related to timing differences that arise from regulated operations.

8712. Total Net Noncurrent Deferred Operating Income Taxes - The total of rows 8710 and 8711.

8720. Total Nonproperty Related Deferred Operating Income Taxes - The total of rows 8702 and 8712.

Account 4110 - Net current deferred nonoperating income taxes, as defined in Section 32.4110 of the Commission's Rules.

8730. Federal Income Taxes - The amount of property-related nonoperating federal income tax expense which has been deferred to later periods as a result of comprehensive interperiod tax allocation.

8731. State and Local Income Taxes - The amount of property-related nonoperating state and local income tax expense which has been deferred to later periods as a result of comprehensive interperiod tax allocation.

8740. Federal Income Taxes - The amount of property-related federal income tax expense, related to current extraordinary items, which has been deferred to later periods as a result of comprehensive interperiod tax allocation.

8741. State and Local Income Taxes - The amount of property-related state and local income taxes, related to current extraordinary items, which has been deferred to later periods as a result of comprehensive interperiod tax allocation.

8750. Net Current Deferred Nonoperating Income Taxes - The total of rows 8730, 8731, 8740 and 8741.

Account 4350 - Net noncurrent deferred nonoperating income taxes, as defined in Section 32.4350.

8760. Federal Income Taxes - The amount of property-related federal income tax expense that has been deferred to later periods as a result of comprehensive interperiod allocation related to nonoperating timing differences.

8761. State and Local Income Taxes - The amount of property-related state and local income tax expense that has been deferred to later periods as a result of comprehensive interperiod allocation related to nonoperating timing differences.

8770. Federal Income Taxes - The amount of property-related federal income tax effect related to noncurrent extraordinary items which have been included in the determination of taxable income in a period different from when it is included in the determination of book income, that is, more than one year.

8771. State and Local Income Taxes - The amount of property-related state and local income tax effect related to noncurrent extraordinary items which have been included in the determination of taxable income in a period different from when it is included in the determination of book income, that is, more than one year.

8780. Total Net Noncurrent Deferred Nonoperating Income Taxes - The total of rows 8760, 8761, 8770, and 8771.

8790. Total Property Related Deferred Nonoperating Income Taxes - The total of rows 8750 and 8780.

8800. Federal Income Taxes - The amount of nonproperty-related federal income tax expense, related to current nonoperating items, resulting from comprehensive interperiod tax allocation which has been deferred to later periods.

8801. State and Local Income Taxes - The amount of nonproperty-related state and local income tax expense, related to current nonoperating items, resulting from comprehensive interperiod tax allocation which has been deferred to later periods.

8810. Federal Income Taxes - The amount of nonproperty-related federal income tax expense, related to current extraordinary items, which have been deferred to later periods resulting from comprehensive interperiod tax allocation.

8811. State and Local Income Taxes - The amount of nonproperty-related state and local income tax expense, related to current extraordinary items, which have been deferred to later periods resulting from comprehensive interperiod tax allocation.

8820. Total Net Current Deferred Nonoperating Income Taxes - The total of rows 8800, 8801, 8810, and 8811.

8830. Federal Income Taxes - The amount of nonproperty-related federal income tax expense that has been deferred to later periods as a result of comprehensive interperiod allocation related to nonoperating timing differences.

8831. State and Local Income Taxes - The amount of nonproperty-related state and local income tax expense that has been deferred to later periods as a result of comprehensive interperiod allocation related to nonoperating timing differences.

8840. Federal Income Taxes - The amount of nonproperty-related federal income tax effect related to noncurrent extraordinary items which have been included in the determination of taxable income in a period different from when it is included in the determination of book income, that is, more than one year.

8841. State and Local Income Taxes - The amount of nonproperty-related state and local income tax related to noncurrent extraordinary items which have been included in the determination of taxable income in a period different from when it is included in the determination of book income, that is, more than one year.

8850. Total Net Noncurrent Deferred Nonoperating Income Taxes - The total of rows 8830, 8831, 8840, and 8841.

8860. Total Nonproperty Related Deferred Nonoperating Income Taxes - The total of rows 8820 and 8850.

COLUMN DESCRIPTIONS

COLUMN

(b) Beginning Balance - Enter the balance at the beginning of the reporting period for each row item.

(c) Account - Enter: the account number 7250 for rows 8672, 8682, 8702, and 7712; the account number 7450 for rows 8730, 8731, 8760, 8761, 8800, 8801, 8830, and 8831; and, the account number 7640 for rows 8740, 8741, 8770, 8771, 8810, 8811, 8840, and 8841.

(d) Current Year Accrual - Enter the amount of deferrals for the current reporting period for each row item.

(e) Current Year Amortization - Enter the amount of amortization for the current reporting period for each row item.

Adjustments - These columns reflect the total amount of debit or credit adjustments consisting of adjustments of $100,000 or more. Each adjustment must be explained in a footnote.

(f) Debit - Enter the total amount of debit adjustments consisting of of $100,000 or more each.

(g) Credit - Enter the total amount of credit adjustments consisting of $100,000 or more each.

(h) End of Year Balance - Enter the end-of-year balance for the reporting period for each row item.

TABLE VIII - PENSION COST

GENERAL INSTRUCTIONS

This table displays the end-of-year amounts for the current and previous reporting periods for each major pension plan used by the reporting carrier. All dollar amounts must be rounded to the nearest thousand. Percents must be rounded to two places. Number of employees must be entered in whole numbers.

ROW INSTRUCTIONS

Rows 8870 through 9021 pertain to the reporting carrier's primary pension plan for its managerial employees.

ROW

8870. Accumulated Benefit Obligation - Enter the actuarial present value of benefits, as of a specific date during the calendar year, determined according to the terms of the pension plan, based on employees' compensation and service to that date (salary progression is not considered in making this computation).

8871. Projected Benefit Obligation - Enter the actuarial present value of all benefits attributed to employee service, up to a specific date, based on the terms of the plan, including a salary progression factor for that pay and career average pay plans.

8872. Fair Value of Plan Assets - Enter the amount that the pension plan would reasonably expect to receive for its investments in a current sale between a willing buyer and a willing seller, that is, a sale other than a forced or liquidation sale.

8873. Discount Rate for Settlement of Liabilities - Enter the discount rate that was used to adjust to present values, for the settlement of liabilities.

8874. Expected Long-Term Return on Assets - Enter the rate of return expected on funds invested, or to be invested, to provide the benefits included in the projected benefit obligation.

8880. Service Cost - Enter the service cost of the net periodic pension calculation.

8881. Interest Cost - Enter the interest cost of the net periodic pension cost calculation.

8882. Return on Plan Assets - Enter the return on plan assets of the periodic pension cost calculation.

8883. Amortization of Transition Amount - Enter the amount of amortization of the transition amount of the net periodic cost calculation.

8884. Amortization of Gains or Losses - Enter the amount of amortization of gains or losses of the net periodic cost calculation.

8885. Total - The total of rows 8880 through 8884.

8890. Number of Active Employees - Enter the number of active employees participating in this pension plan.

8891. Number of Retired Employees - Enter the number of retired employees participating in this pension plan.

9000. Minimum Required Contribution - Enter the amount of the reporting carrier's minimum payment to its managerial employees' pension fund to meet the requirement set forth in the Employee Retirement Income Security Act of 1974 (ERISA).

9001. Actual Contribution - Enter the amount actually contributed by the reporting carrier to its managerial employees' pension fund.

9002. Maximum Amount Deductible - Enter the maximum amount of pension expense allowable under Section 415 of the Internal Revenue Code at the reporting company level.

9003. Benefit Payments - Enter the amount of disbursements from pensions to entitled participants for pension benefits, death benefits, and benefits due on termination of employment, at the reporting company level.

9010. Pension Cost - Enter the reporting company's total pension cost.

9011. Pension Cost Capitalized - Enter the reporting company's amount of capitalized pension cost.

9012. Accumulated Pension Asset/Liability-End of Year - Enter the reporting company's pension cost or liability at the end of the year.

9020. Number of Active Employees - Enter the number of active employees, in the employ of the reporting carrier, participating in this pension plan.

9021. Number of Retired Employees - Enter the number of retired employees, in the employ of the reporting carrier, participating in this pension plan.

Rows 9030 through 9081 pertain to the reporting carrier's primary pension plan for its non-managerial employees.

ROW

9030. Accumulated Benefit Obligation - Enter the actuarial present value of benefits, as of a specific date during the calendar year, determined according to the terms of the pension plan, based on employees' compensation and service to that date (salary progression is not considered in making this computation).

9031. Projected Benefit Obligation - Enter the actuarial present value of all benefits attributed to employee service, up to a specific date, based on the terms of the plan, including a salary progression factor for that pay and career average pay plans.

9032. Fair Value of Plan Assets - Enter the amount that the pension plan would reasonably expect to receive for its investments in a current sale between a willing buyer and a willing seller, that is, a sale other than a forced or liquidation sale.

9033. Discount Rate for Settlement of Liabilities - Enter the discount rate that was used to adjust to present values, for the settlement of liabilities.

9034. Expected Long-Term Return on Assets - Enter the rate of return expected on funds invested, or to be invested, to provide the benefits included in the projected benefit obligation.

9040. Service Cost - Enter the service cost of the net periodic pension calculation.

9041. Interest Cost - Enter the interest cost of the net periodic pension cost calculation.

9042. Return on Plan Assets - Enter the return on plan assets of the periodic pension cost calculation.

9043. Amortization of Transition Amount - Enter the amount of amortization of the transition amount of the net periodic cost calculation.

9044. Amortization of Gains or Losses - Enter the amount of amortization of gains or losses of the net periodic cost calculation.

9045. Total - The total of rows 9040 through 9044.

9050. Number of Active Employees - Enter the number of active employees participating in this pension plan.

9051. Number of Retired Employees - Enter the number of retired employees participating in this pension plan.

9060. Minimum Required Contribution - Enter the amount of the reporting carrier's minimum payment to its non-managerial employees' pension fund to meet the requirement set forth in the Employee Retirement Income Security Act of 1974 (ERISA).

9061. Actual Contribution - Enter the amount actually contributed by the reporting carrier to its non-managerial employees' pension fund.

9062. Maximum Amount Deductible - Enter the maximum amount of pension expense allowable under Section 415 of the Internal Revenue Code at the reporting company level.

9063. Benefit Payments - Enter the amount of disbursements from pensions to entitled participants for pension benefits, death benefits, and benefits due on termination of employment, at the reporting company level.

9070. Pension Cost - Enter the reporting company's total pension cost.

9071. Pension Cost Capitalized - Enter the reporting company's amount of capitalized pension cost.

9072. Accumulated Pension Asset/Liability-End of Year - Enter the reporting company's pension cost or liability at the end of the year.

9080. Number of Active Employees - Enter the number of active employees, in the employ of the reporting carrier, participating in this pension plan.

9081. Number of Retired Employees - Enter the number of retired employees, in the employ of the reporting carrier, participating in this pension plan.

Rows 9090 through 9141 pertain to the reporting carrier's alternative pension plan for its managerial employees.

ROW

9090. Accumulated Benefit Obligation - Enter the actuarial present value of benefits, as of a specific date during the calendar year, determined according to the terms of the pension plan, based on employees' compensation and service to that date (salary progression is not considered in making this computation).

9091. Projected Benefit Obligation - Enter the actuarial present value of all benefits attributed to employee service, up to a specific date, based on the terms of the plan, including a salary progression factor for that pay and career average pay plans.

9092. Fair Value of Plan Assets - Enter the amount that the pension plan would reasonably expect to receive for its investments in a current sale between a willing buyer and a willing seller, that is, a sale other than a forced or liquidation sale.

9093. Discount Rate for Settlement of Liabilities - Enter the discount rate that was used to adjust to present values, for the settlement of liabilities.

9094. Expected Long-Term Return on Assets - Enter the rate of return expected on funds invested, or to be invested, to provide the benefits included in the projected benefit obligation.

9100. Service Cost - Enter the service cost of the net periodic pension calculation.

9101. Interest Cost - Enter the interest cost of the net periodic pension cost calculation.

9102. Return on Plan Assets - Enter the return on plan assets of the periodic pension cost calculation.

9103. Amortization of Transition Amount - Enter the amount of amortization of the transition amount of the net periodic cost calculation.

9104. Amortization of Gains or Losses - Enter the amount of amortization of gains or losses of the net periodic cost calculation.

9105. Total - The total of rows 8880 through 8884.

9110. Number of Active Employees - Enter the number of active employees participating in this pension plan.

9111. Number of Retired Employees - Enter the number of retired employees participating in this pension plan.

9120. Minimum Required Contribution - Enter the amount of the reporting carrier's minimum payment to its managerial employees' pension fund to meet the requirement set forth in the Employee Retirement Income Security Act of 1974 (ERISA).

9121. Actual Contribution - Enter the amount actually contributed by the reporting carrier to its managerial employees' pension fund.

9122. Maximum Amount Deductible - Enter the maximum amount of pension expense allowable under Section 415 of the Internal Revenue Code at the reporting company level.

9123. Benefit Payments - Enter the amount of disbursements from pensions to entitled participants for pension benefits, death benefits, and benefits due on termination of employment, at the reporting company level.

9130. Pension Cost - Enter the reporting company's total pension cost.

9131. Pension Cost Capitalized - Enter the reporting company's amount of capitalized pension cost.

9132. Accumulated Pension Asset/Liability-End of Year - Enter the reporting company's pension cost or liability at the end of the year.

9140. Number of Active Employees - Enter the number of active employees, in the employ of the reporting carrier, participating in this pension plan.

9141. Number of Retired Employees - Enter the number of retired employees, in the employ of the reporting carrier, participating in this pension plan.

Rows 9150 through 9201 pertain to the reporting carrier's alternative pension plan for its non-managerial employees.

ROW

9150. Accumulated Benefit Obligation - Enter the actuarial present value of benefits, as of a specific date during the calendar year, determined according to the terms of the pension plan, based on employees' compensation and service to that date (salary progression is not considered in making this computation).

9151. Projected Benefit Obligation - Enter the actuarial present value of all benefits attributed to employee service, up to a specific date, based on the terms of the plan, including a salary progression factor for that pay and career average pay plans.

9152. Fair Value of Plan Assets - Enter the amount that the pension plan would reasonably expect to receive for its investments in a current sale between a willing buyer and a willing seller, that is, a sale other than a forced or liquidation sale.

9153. Discount Rate for Settlement of Liabilities - Enter the discount rate that was used to adjust to present values, for the settlement of liabilities.

9154. Expected Long-Term Return on Assets - Enter the rate of return expected on funds invested, or to be invested, to provide the benefits included in the projected benefit obligation.

9160. Service Cost - Enter the service cost of the net periodic pension calculation.

9161. Interest Cost - Enter the interest cost of the net periodic pension cost calculation.

9162. Return on Plan Assets - Enter the return on plan assets of the periodic pension cost calculation.

9163. Amortization of Transition Amount - Enter the amount of amortization of the transition amount of the net periodic cost calculation.

9164. Amortization of Gains or Losses - Enter the amount of amortization of gains or losses of the net periodic cost calculation.

9165. Total - The total of rows 9040 through 9044.

9170. Number of Active Employees - Enter the number of active employees participating in this pension plan.

9171. Number of Retired Employees - Enter the number of retired employees participating in this pension plan.

9180. Minimum Required Contribution - Enter the amount of the reporting carrier's minimum payment to its non-managerial employees' pension fund to meet the requirement set forth in the Employee Retirement Income Security Act of 1974 (ERISA).

9181. Actual Contribution - Enter the amount actually contributed by the reporting carrier to its non-managerial employees' pension fund.

9182. Maximum Amount Deductible - Enter the maximum amount of pension expense allowable under Section 415 of the Internal Revenue Code at the reporting company level.

9183. Benefit Payments - Enter the amount of disbursements from pensions to entitled participants for pension benefits, death benefits, and benefits due on termination of employment, at the reporting company level.

9190. Pension Cost - Enter the reporting company's total pension cost.

9191. Pension Cost Capitalized - Enter the reporting company's amount of capitalized pension cost.

9192. Accumulated Pension Asset/Liability-End of Year - Enter the reporting company's pension cost or liability at the end of the year.

9200. Number of Active Employees - Enter the number of active employees, in the employ of the reporting carrier, participating in this pension plan.

9201. Number of Retired Employees - Enter the number of retired employees, in the employ of the reporting carrier, participating in this pension plan.

Table VIII - Column Descriptions

Column

(b) Current Year - Enter the appropriate amounts for the current reporting period.

(c) Previous Year - Enter the appropriate amounts for the preceding reporting period.

TABLE IX - OUTSIDE PLANT STATISTICS

GENERAL INSTRUCTIONS

Table IX requires the annual reporting of various outside plant statistics by state as of December 31 of the calendar year covered by the report. Report all solely owned plant and the respondent's proportionate interest in jointly owned plant.

To convert miles to kilometers, compute total miles, multiply by 1.6093 and then round to the nearest whole number. Internal calculations should retain, where applicable, at least 4 decimal places of accuracy; compute totals and then round to the nearest whole number before applying weighting factors. Final results should be rounded to the nearest whole number, but report any non-zero entry that is less than 1 kilometer as 1 kilometer.

Footnotes should be included in the Footnote Table liberally, especially where the reporting company perceives any ambiguities in the data provided, where procedures or internal sources associated with data preparation have changed, or where required data are available only in part or on an estimated basis.

ROW INSTRUCTIONS

Each row represents a state, district or territory in which the reporting company has outside plant facilities. Include only those rows with data to be reported, but complete every item in those rows. Include a row for total company data, even if there is only one state row.

COLUMN DESCRIPTIONS

Each column represents a category of outside plant. In columns (d) through (t) a cable containing both copper and fiber should be classified as fiber. In columns (c) through (aa) include both local loop and interoffice facilities. In columns (ab) through (ad) include both local loop and interoffice facilities and provide a footnote to indicate the interoffice facilities included in the total.

COLUMN

(a) State or Territory - The name of one of the fifty U.S. states or one of the following: District of Columbia, Puerto Rico, Virgin Islands, Ocean Cable, or Total.

(b) State or Territory Code - The two-letter Postal Abbreviation for the state or territory. Use "OC" for Ocean Cable and "TO" for Total Company.

(c) Kilometers of Aerial Wire - Consists of both open and insulated single or multipaired covered wire. Include both local loop and interoffice facilities where applicable.

Aerial Cable - Cables that are attached to utility poles. The cables in this environment can have metallic conductors or non-metallic fibers. Include both local loop and interoffice facilities where applicable.

(d) Sheath Kilometers of Copper Aerial Cable - Sheath kilometers of aerial cable with copper or other metallic conductors.

(e) Sheath Kilometers of Fiber Aerial Cable - Sheath kilometers of aerial cable with non-metallic fibers.

Underground Cable - Cables that are located in conduit and manholes. The cables in this environment can contain conductors that are metallic copper or non-metallic optical fibers. Include both local loop and interoffice facilities where applicable.

(f) Sheath Kilometers of Copper Underground Cable - Sheath kilometers of underground cable containing copper or other metallic conductors.

(g) Sheath Kilometers of Fiber Underground Cable - Sheath kilometers of underground cable containing non-metallic fibers.

Buried Cable - This cable account consists of cables that are buried directly below the ground and not placed in conduit structure. The cables in this environment can have conductors that are metallic copper or non-metallic optical fibers. Include both local loop and interoffice facilities where applicable.

(h) Sheath Kilometers of Copper Buried Cable - Sheath kilometers of buried cable with copper or other metallic conductors.

(i) Sheath Kilometers of Fiber Buried Cable - Sheath kilometers of buried cable with non-metallic fibers.

Submarine Cable - Cables that are submerged and cross large bodies of water. Cables in this environment are laid directly on the bottom and not enclosed within a protective cover such as conduit. The cables in this environment can have transmission paths comprised of either metallic conductors or non-metallic optical fibers. Include both local loop and interoffice facilities where applicable.

(j) Sheath Kilometers of Copper Submarine Cable - Sheath kilometers of submarine cable with copper or other metallic conductors.

(k) Sheath Kilometers of Fiber Submarine Cable - Sheath kilometers of submarine cable with non-metallic fibers.

Deep Sea Cable - Cables that are designed for use in deep sea water such as the Atlantic or Pacific Ocean. Include both local loop and interoffice facilities where applicable.

(l) Sheath Kilometers of Copper Deep Sea Cable - Sheath kilometers of deep sea cable with copper or other metallic conductors.

(m) Sheath Kilometers of Fiber Deep Sea Cable - Sheath kilometers of deep sea cable with non-metallic fibers.

Intrabuilding Network Cable - Cables located on the carrier's side of the demarcation point or standard network interface inside subscribers' buildings or between buildings on one customer's same premises. Include both local loop and interoffice facilities where applicable.

(n) Sheath Kilometers of Copper Intrabuilding Network Cable - Sheath kilometers of intrabuilding network cable with copper or other metallic conductors.

(o) Sheath Kilometers of Fiber Intrabuilding Network Cable - Sheath kilometers of intrabuilding network cable with non-metallic fibers.

Total Cable - All cables, including wire, coaxial cables, and fiber. Include both local loop and interoffice facilities where applicable.

(p) Sheath Kilometers of Total Copper Cable - Sheath kilometers of total cable with copper or other metallic conductors. This is the sum of columns (d), (f), (h), (j), (l) and (n).

(q) Sheath Kilometers of Total Fiber Cable - Sheath kilometers of total cable with non-metallic fibers. This is the sum of columns (e), (g), (i), (k), (m) and (o).

Kilometers of Fiber in Cable - Fiber optic cables contain thin filaments of glass or other transparent material enclosed in a protective sheath through which light beams may be transmitted. Include both local loop and interoffice facilities where applicable.

(r) Fiber Kilometers Equipped with Electronics (Lit) - The portion of fiber kilometers that are equipped by the reporting company with opto-electronics for transmission use or are ready for use at the DS-3 level. (Do not provide total sheath kilometers.)

(s) Total Fiber Kilometers Deployed (Lit and Dark) - Total deployed fiber measurement calculated as the weighted sum of the number of optical fibers in the sheath for each cable multiplied by the associated sheath kilometers. Provide the total deployed fiber kilometers, not just the portion in service or equipped with carrier equipment.

(t) Kilometers of Copper Wire in Cable - The weighted sum of the number of copper or other metallic conductors in each cable multiplied by the associated sheath kilometers. The conductors must be capable of supporting present or future telecommunications traffic.

(u) Equipped Kilometers of Tube in Coaxial Cable - The weighted sum of the number of tubes equipped with electronics in each cable multiplied by the associated coaxial sheath kilometers. Provide only the number of tube kilometers of coaxial equipped with electronics, not total sheath kilometers. Include both local loop and interoffice facilities where applicable.

Radio Relay System - Equipment that is used to transmit and receive radio waves (above 890 mhz) through space over which communications channels are provided. In columns (v), (w), and (x) report the aggregate number of kilometers of system or channel, as appropriate, between the individual stations or radio-relay systems. Include both local loop and interoffice facilities where applicable.

(v) Kilometers of System - Total distance between repeater sites making up microwave radio systems above 890 mhz. Where a system meets another company's system, only include kilometers to the border of the adjacent company. Do not include satellite systems in this total.

(w) Kilometers of Radio Channel - Total kilometers of one-way radio channel above 890 mhz used for message, special services, video, or protection. A radio channel consists of a single link using a microwave transmitter and receiver. The radio channel distance is the sum of the lengths of each link associated with a transmitter-receiver pair. Where a radio channel interfaces with that of another company, only include kilometers to the border of the adjacent company. In the case of satellite systems, calculate radio channel kilometers as the terrestrial distance between the receiver and transmitter terminal locations and provide a footnote to indicate the satellite kilometers included in the total.

(x) Kilometers of Telephone Channel (Equivalent 4Khz and 64Kb/Sec) - Number of equivalent analog (4khz) or digital (64kb/sec) telephone circuit kilometers that are equipped and on radio systems above 890 mhz. This value is the weighted sum of the number of equivalent analog or digital circuits on each link times the length of the link and is larger than the radio channel kilometers unless most radio systems carry no active circuits. In the case of radio systems carrying DS-1 channels for which DS-1 utilization is not known, the value may be computed by calculating the weighted sum of the number of DS-1's on each link times the length of the link, rounding the result to the nearest whole kilometer, and multiplying by 24. Provide a footnote to indicate the digital circuit kilometers included in the total.

(y) Number of Poles - The sum of solely owned and portions of jointly owned poles. Include both local loop and interoffice facilities where applicable.

Conduit System - Pipe placed in the ground (which is reusable in place) through which cables are pulled. Include both local loop and interoffice facilities where applicable.

(z) Trench Kilometers - Length of the ditch that contains the duct.

(aa) Duct Kilometers - The number of ducts times the trench kilometers.

Total Equipped Circuit Kilometers (Cable and Microwave Systems) - Total equivalent telephone grade circuit kilometers in carrier plant. Include both local loop and interoffice facilities and provide a footnote to indicate the interoffice circuit kilometers included in each column.

(ab) Analog (4Khz or Equivalent) - Includes open wire, paired cable (K, N1, N2, N3, N4, ON, ON/K), microwave radio (TL, TM, TD2, TD3), and other analog microwave. Report in equivalent 4khz circuit kilometers.

(ac) Digital (64Kb/Sec or Equivalent) - Includes lightguide (fiber) cables, digital subscriber paired cable (T1, T1C, T1D, T2), and microwave radio (DR11-40, other digital microwave). Report as equivalent 64kb/sec circuit kilometers. This may be calculated by summing unrounded DS-1 kilometers, rounding the total to the nearest kilometer, and weighting the result by 24.

(ad) Video - Kilometers of derived video channel.

TABLE X - SWITCHED ACCESS LINES IN SERVICE BY TECHNOLOGY

GENERAL INSTRUCTIONS

Table X requires the annual reporting of central office switches and switched access line statistics by state as of December 31 of the calendar year covered by the report.

Include access lines associated with switched services only. Include WATS and "WATS like" access lines, as well as 800 and "800 like" access lines, but do NOT include official/company circuits in the access line counts. Provide a footnote if this has been done differently in the past. Do not include in Table X circuits that provide access to an interexchange carrier. Do not include in Table X any special access lines; all special access lines or lines associated with non-switched services should be included in Table XI, column (i) or (j).

Footnotes should be included in the Footnote Table liberally, especially where the reporting company perceives any ambiguities in the data provided, where procedures or internal sources associated with data preparation have changed, or where required data are available only in part or on an estimated basis.

ROW INSTRUCTIONS

Each row represents a state, district or territory in which the reporting company has switched access lines. Include only those rows with data to be reported, but complete every item in those rows. Include a row for total company data, even if there is only one state row.

COLUMN DESCRIPTIONS

Each column represents a category of switched access lines, central office switches, or ISDN control channels.

COLUMN

(a) State or Territory - The name of one of the fifty U.S. states or one of the following: District of Columbia, Puerto Rico, Virgin Islands, or Total.

(b) State or Territory Code - The two-letter Postal Abbreviation for the state or territory. Use "TO" for Total Company.

Analog Switched Access Lines (4Khz or Equivalent) - Switched network access lines and equivalent 4khz analog access circuits or trunks. This will include access lines from a digital switch if the lines themselves are not terminated at the customer's premises as digital lines.

(c) Main Analog Access Lines (4Khz or Equivalent) - Total analog switched network access lines excluding PBX Trunks, Centrex-CO lines, and Centrex-CU Trunks, Hotel/Motel LD Trunks, and Multi-Line Semi-Public Lines. Provide the number of analog 4khz or equivalent access lines connecting to single or multiline telephones.

(d) Analog PBX and Centrex Access Trunks (4Khz or Equivalent) - Equivalent 4khz analog access circuits or trunks between the central office and a customer location PBX or Centrex; service is provided by equipment located on customer-controlled space including Centrex-CU Trunks, PBX Trunks, Hotel/Motel LD Trunks, and Multi-Line Semi-Public Lines.

(e) Analog Centrex Extensions (4Khz or Equivalent) - Equivalent 4khz analog circuits connecting a Centrex or PBX on telephone company premises to telephones on the customer's premises; service is provided by equipment on telephone company owned or leased space including Centrex-CO Lines.

Digital Switched Access Lines (64Kb/Sec or Equivalent) - Switched network access lines and equivalent 64kb/sec (or 56kb/sec) digital access circuits or trunks. To be classified as digital, the access lines must be terminated at the customer end as digital lines or be available for use by the customer as digital lines. This will not include access lines from a digital switch if the lines themselves are not terminated at the customer's premises as digital lines.

(f) Main Digital Access Lines (64Kb/Sec or Equivalent) - The 64kb/sec or 56kb/sec or ISDN B channels or other equivalent communications channels of digital subscriber lines that are circuit switched and can carry either voice or data. An example might be a line that is used with a phone from a DMS 100 switch. Do not include access lines connecting to a customer location PBX or Centrex.

(g) Digital PBX and Centrex Access Trunks (64Kb/Sec or Equivalent) - The number of 64kb/sec or equivalent digital lines terminated on a customer location PBX and/or Centrex.

(h) Digital Centrex Extensions (64Kb/Sec or Equivalent) - The number of 64kb/sec or equivalent digital circuits connecting a Centrex or PBX on telephone company premises to telephones on the customer's premises; service is provided by equipment on telephone company owned or leased space including Centrex-CO Lines.

(i) Other Switched Access Lines - Provide, in terms of equivalent 4khz analog circuits or equivalent 64kb/sec digital circuits, the number of other switched access lines not included in columns (c) through (h). Use a footnote to itemize the separate categories and amounts which are included here.

(j) Total Switched Access Lines - The sum of columns (c) through (i). This should equal the amount reported in Table XI column (h).

Central Office Switches - Assemblies of equipment designed to establish connections between lines and trunks, including access tandems, local, class 5 switching machines, and any associated remotes. There may be more than one switch per central office or wire center. Switches designed exclusively for operator services are not included in columns (k) through (m). If more than one switch is housed in a single building or structure, be sure to count each switch separately. Do not separately count each three-digit telephone number prefix as a separate switch.

(k) Central Office Switches Excluding Remotes - The amount in column (m) minus the amount in column (l) for each row.

(l) Remote Switches - Generally described as a switching entity that has no connection to the facilities network except through one other (host) switching entity, that shares the processing capabilities of another switching system for certain control functions under the direction of the host central processor, and that can be controlled remotely by the host over a pair of dedicated data links. Include not only those remote switching entities that are equipped to operate in a stand alone fashion to be able to provide more limited service, but also those that are not so equipped.

(m) Total Central Office Switches - The total number of local and access tandem switching entities. Tandem switching entities are used to connect local switching entities with local switching entities in other central offices, including those tandems that are designed exclusively to establish connections between trunks. This definition is consistent with the definition for Row 0110, Total Switching Entities, in Table I of FCC Report 43-07, the ARMIS Infrastructure Report.

ISDN Control Channels - The packet switched channels on digital subscriber lines (16kb/sec for basic rate access or 64kb/sec for primary rate access) that carry signaling messages and packet-switched user data. This information should be reported in terms of actual control channels rather than in 64kb/sec equivalents (as was requested for 1988 through 1990) and should not be included in the total reported in column (j). Where ISDN services are provided, use column (n) and (o) to show the number of 16kb/sec and 64kb/sec control channels. For similar services, provide the total number of control channels and indicate the types included in a footnote.

(n) Basic Rate ISDN Control Channels - The number of basic rate (16kb/sec) ISDN control channels. Also include the number of control channels for similar services with a data rate lower than 16kb/sec, and indicate the types included in a footnote.

(o) Primary Rate ISDN Control Channels - The number of primary rate (64kb/sec) ISDN control channels. Also include the number of control channels for similar services with a data rate higher than 16kb/sec, and indicate the types included in a footnote.

TABLE XI - ACCESS LINES IN SERVICE BY CUSTOMER

GENERAL INSTRUCTIONS

Table XI requires the annual reporting of switched and special access line statistics by state as of December 31 of the calendar year covered by the report.

In Table XI columns (c) through (h), report access lines associated with switched services, i.e., all equivalent 4khz or 64kb/sec access lines included in Table X columns (c) through (j). Report special access lines in table XI column (i) or column (j).

Include WATS and "WATS like" access lines, as well as 800 and "800 like" access lines, but do **NOT** include official/company circuits in the access line counts. Provide a footnote if this has been done differently in the past. Do not include circuits that provide access to an interexchange carrier. Analog access lines should be reported as 4khz equivalents. ISDN and other digital access lines should be reported as 64kb/sec equivalents. A fully equipped DS-1 line, for example, corresponds to 24 64kb/sec equivalents.

Footnotes should be included in the Footnote Table liberally, especially where the reporting company perceives any ambiguities in the data provided, where procedures or internal sources associated with data preparation have changed, or where required data are available only in part or on an estimated basis.

ROW INSTRUCTIONS

Each row represents a state, district or territory in which the reporting company has access lines. Include only those rows with data to be reported, but complete every item in those rows. Include a row for total company data, even if there is only one state row.

COLUMN DESCRIPTIONS

Each column represents a category of switched or special access lines.

COLUMN

(a) State or Territory - The name of one of the fifty U.S. states or one of the following: District of Columbia, Puerto Rico, Virgin Islands, or Total.

(b) State or Territory Code - The two-letter Postal Abbreviation for the state or territory. Use "TO" for Total Company.

Business Access Lines - Total equivalent switched access lines to business customers.

(c) Analog Single Line Business Access Lines - The single line business customer premises terminations (CPTs) subject to the single line business interstate subscriber line charge, excluding company official, mobile radiotelephone and public telephone. CPTs are commonly referred to as "main station equivalents" or "billable units." A CPT is a line termination at the customer premises, rather than at the central office. Do not include in this column any equivalent 64kb/sec digital access lines reported in Table X.

(d) Multi-Line and Digital Business Access Lines - Include the total of multi-line business CPTs subject to the multi-line business interstate subscriber line charge including multi-line semi-public lines, PBX trunks, Centrex CU trunks, hotel/motel LD trunks and Centrex CO lines ordered after July 27, 1983, and Centrex CO and CTX CO-like lines in service or ordered as of July 27, 1983. Also include in this column all equivalent 64kb/sec digital business access lines as reported in Table X and provide a footnote to indicate the digital access lines included in the total.

(e) Public Access Lines - The total of Coin (Public and Semi-Public) and public lines excluding customer owned pay telephones (COPT).

(f) Residential Access Lines - Total equivalent analog (4khz) or digital (64kb/sec) switched access lines to residential customers. Include in this column all equivalent digital residential access lines as reported in Table X and provide a footnote to indicate the digital access lines included in the total.

(g) Mobile Access Lines - Access lines to a common carrier base station using mobile radio.

(h) Total Switched Access Lines - The sum of columns (c) through (g). This should equal the amount reported in Table X column (j).

Special Access Lines (Non-Switched) - Total special access lines connecting an end user's premises to an interexchange carrier point of presence. Do not include local private lines provided by the local carrier which originate and terminate within the same LATA.

(i) Analog Special Access Lines (Non-Switched) - The number of 4khz or equivalent analog special access lines.

(j) Digital Special Access Lines (Non-Switched) - The number of 64kb/sec or equivalent digital special access lines terminated on the customer location. Where DS-3 or DS-1 service is provided without individual 64kb/sec circuit terminations, weight the number of DS-3 terminations by 672 and the number of DS-1 terminations by 24 when calculating the value for this column. In the above calculation, only use those DS-1's and DS-3's for which the customer is billed. Do not double count 64kb/sec circuits associated with DS-1 service where the 64kb/sec circuits are customer derived.

(k) Total Access Lines (Switched and Special) - The sum of columns (h) through (j).

TABLE XII - TELEPHONE CALLS

GENERAL INSTRUCTIONS

Table XII requires the annual reporting of telephone call statistics by state for the calendar year covered by the report. All amounts must be rounded to the nearest thousand.

Call counts should reflect completed calls. Where completed call data is unavailable, estimates may be reported (e.g., the numbers shown may be based on an actual count taken periodically during the year), but indicate the methodology and source data used in a footnote. Billed access minutes reflect originating and terminating access minutes billed to interexchange carriers, including call set-up time, holding time, and conversation time.

Footnotes should be included in the Footnote Table liberally, especially where the reporting company perceives any ambiguities in the data provided, where procedures or internal sources associated with data preparation have changed, or where required data are available only in part or on an estimated basis.

ROW INSTRUCTIONS

Each row represents a state, district or territory in which the reporting company provides service. Include only those rows with data to be reported, but complete every item in those rows. If data are not available as to the location of all access lines by state, the data may be allocated according to the location of the central office toll center through which the calls originate. Include a row for total company data, even if there is only one state row.

COLUMN DESCRIPTIONS

Each column represents a category of telephone calls or minutes.

COLUMN

(a) State or Territory - The name of one of the fifty U.S. states or one of the following: District of Columbia, Puerto Rico, Virgin Islands, or Total.

(b) State or Territory Code - The two-letter Postal Abbreviation for the state or territory. Use "TO" for Total Company.

(c) Local Calls Completed - The number of completed calls between points both of which are within the local service area of the calling telephone, or total calls minus total toll calls.

Toll Calls - The number of calls directed to a point outside the local service area of the calling telephone. The number of toll calls reported should be based upon originating message volumes.

(d) IntraLATA Toll Calls Completed - The number of completed toll calls handled by the reporting local operating company within a given Local Access and Transport Area (LATA). Include intraLATA-interstate and intraLATA-intrastate toll calls.

InterLATA Toll Calls - Calls directed to interexchange carriers.

(e) InterLATA-interstate Toll Calls Completed - The number of completed interstate toll calls directed to interexchange carriers. Include outward calls, 800 service, directory service and dial-it service. Calls should not be double counted at the originating and terminating ends.

(f) InterLATA-interstate Billed Access Minutes - The number of interLATA-interstate access minutes based on bills sent to interexchange carriers. Include total originating and terminating access minutes of use. Where these data are unavailable, a statistically valid calculation may be made based on other data, but provide a footnote describing the source data and methodology.

(g) InterLATA-intrastate Toll Calls Completed - The number of completed intrastate toll calls directed to interexchange carriers. Include outward calls, 800 service, directory service, dial-it service, and optional calling plans. Calls should not be double counted at the originating and terminating ends.

(h) InterLATA-intrastate Billed Access Minutes - The number of interLATA-intrastate access minutes based on bills sent to interexchange carriers. Include total originating and terminating access minutes of use. Where these data are unavailable, a statistically valid calculation may be made based on other data, but provide a footnote describing the source data and methodology.

(i) Total InterLATA Toll Calls Completed - The sum of columns (e) and (g).

(j) Total InterLATA Billed Access Minutes - The sum of columns (f) and (h).

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